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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

No. 78-719

REPRODUCTIVE SERVICES, INC., and ~~REPRODUCTIVE ASSOCIATES, P.A.~~,

Petitioners,

v.

HONORABLE DEE BROWN WALKER,
District Judge of the 162nd Judicial District Court
of Dallas County, Texas,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF TEXAS

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Petitioners,

v.

HONORABLE DEE BROWN WALKER,
District Judge of the 162nd Judicial District Court
of Dallas County, Texas,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF TEXAS

Reproductive Services, Inc., ~~and Reproductive Associates, P.A., respectfully~~ petition this Court for a writ of certiorari to review the order and judgment of the Supreme Court of Texas denying review of an order of the District Court of Dallas County. The order required petitioners to produce numerous medical records of former patients at five clinics throughout Texas. These patients had first trimester abortions, and have not consented to any breach of confidentiality, nor to investigative discovery. Petitioners claim that the sweeping disclosure order

impermissibly abridges fundamental privacy rights protected by *Roe v. Wade*, 410 U.S. 113 (1973), and *Planned Parenthood v. Danforth*, 428 U.S. 52 (1976). The order far exceeds that permitted by *Whalen v. Roe*, 429 U.S. 589 (1977).

On August 21, 1978, Mr. Justice Brennan, in a chambers opinion (App. A at 1a) continued a stay granted earlier on July 10, 1978 (App. A at 3a).

CITATION TO OPINIONS

The orders and opinions are not officially reported. All are set out in Appendix A to this Petition, *infra*, as follows:

August 21, 1978, chambers opinion of Mr. Justice Brennan, renewing stay. App. A at 1a).

July 17, 1978, chambers opinion of Mr. Justice Brennan. (App. A at 3a).

June 23, 1978, order and judgment of the Supreme Court of Texas. (App. A at 6a).

June 22, 1978, order of the Supreme Court of Texas. (App. A at 8a).

August 2, 1978, order of the District Court of Dallas County, Texas. (App. A at 10a).

June 22, 1978, stipulated order of the District Court of Dallas County, Texas. (App. A at 18a).

June 21, 1978, transcript of order in chambers by the District Court of Dallas County, Texas. (App. A at 21a).

June 15, 1978, order of the District Court of Dallas County, Texas, overruling motion to quash subpoena duces tecum for medical records, inter alia. (App. A at 23a). Subpoena, issued June 8, 1978. (App. A at 27a).

JURISDICTION

(i) The Supreme Court of Texas issued and filed its judgment on June 23, 1978. (App. A at 6a).

(ii) Petitioners requested no rehearing. On September 16, 1978, Mr. Justice Powell granted an extension of time up to and including October 30, 1978, in which to file the petition for writ of certiorari.

(iii) Title 28, U.S. Code, § 1257(3), confers jurisdiction on this Court to review the case. Decisions supporting jurisdiction over the subject matter include: *Carey v. Population Services International*, 431 U.S. 678 (1977); *Whalen v. Roe*, 429 U.S. 589 (1977).

Decisions also support jurisdiction of the case as a "final judgment" on important federal questions "separable from and collateral to" the merits, where denial of immediate review would cause irreparable injury and render impossible any review whatsoever. *See, e.g., National Socialist Party v. Village of Skokie*, 432 U.S. 43, 44 (1977) (per curiam); *North Dakota Pharmacy Board v. Snyder's Stores*, 414 U.S. 156, 159-163 (1973); *Cohen v. Beneficial Loan Corp.*, 337 U.S. 541, 546 (1949); *Forgay v. Conrad*, 46 U.S. (6 How.) 201, 204 (1847) (Taney, C.J.); *cf. United States v. Nixon*, 418 U.S. 683, 691-692 (1974).

QUESTIONS PRESENTED

I. Whether the Fourteenth Amendment right of privacy in access to abortion includes a right of patient confidentiality and freedom from intrusion by investigators, except in narrowly defined circumstances and upon a showing of compelling necessity?

II. Whether the Dallas trial court discovery order in this civil case unreasonably invades the privacy rights of

former abortion patients at the five clinics throughout Texas, where the State showed no compelling necessity for particular records, and no procedures were established to prevent unreasonable intrusion upon patients by investigators, process servers, and other agents of respondents?

DISCLOSURE ORDER AT ISSUE

The final amended discovery order proposed after the initial stay and entered by the trial court August 2, 1978, is a seven (7) page document set out in Appendix A, *infra*, at 10a-17a. Particular provisions at issue include the following:

[*Discovery by Plaintiff*]

"It is further Ordered, Adjudged, and Decreed that nothing contained in this Order shall in any way prevent counsel for Plaintiff or Plaintiff-Intervenor from conducting full and complete discovery in preparation for this lawsuit as concerns the taking of testimony, interviews, the taking of statements, examination of documents, and any other discovery counsel for Plaintiff and Plaintiff-Intervenor shall deem necessary . . . ."[1] Order, pp. 6, 7. [App. A at 17a.]

[*Disclosure of Original Records*]

". . . Plaintiff and Plaintiff-Intervenor shall have a period of not more than sixty (60) days following production of the above items A, B, and C above. During the sixty (60) day period stated above, counsel for Plaintiff or Plaintiff-Intervenor may, *upon application to the Court*,[2] and notice to all

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[1] Petitioners (defendants below) are not granted any reciprocal discovery rights for rebuttal purposes.

[2] No standards are established for ruling upon an application to inspect the original records, and to follow up with discovery.

parties, be granted permission to inspect or examine the original documents or tangible things subject to the protective provisions provided hereafter concerning the use or disclosure of any patient's name." Order, p. 3. [Emphasis added.] [App. A at 13a.]

[*Persons with Access to the Records*]

"It is therefore further Ordered, that the identities of any and all of Defendants' patients contained in any document, paper, book, account, letter, record, chart or any other object or tangible thing required to be produced by Defendants shall be revealed to no other persons than the following:

"(1) Judge Dee Brown Walker

"(2) Court personnel designated by Judge Dee Brown Walker

"(3) The following counsel:
(a) Mr. Seagal Wheatley
(b) Mr. Richard A. Sayles
(c) Mr. George Kolb
(d) Mr. B. Prater Monning, III
(e) Mr. Tom Stollenwerck
(f) Mr. Roy Lucas
(g) Mr. G. H. Kelsoe, Jr.
(h) Mr. Jack R. Ayers, Jr.
(i) Mr. Joe Chumlea
(j) Ms. Mannette A. Dodge
(k) Mr. Bill Flanary.

"(4) *Experts and clerical and investigative staff* designated by above mentioned counsel

"(5) Any court reporter retained or appointed to record testimony in any proceeding herein." [Emphasis added.] [App. A at 15a.]

[*Categories of Patients Subject to Record Disclosure and Investigation*]

". . . Defendants, Reproductive Services, Inc. and Reproductive Associates, P.A., should be compelled to produce the following materials and information:

"(1) *All medical records*, incident reports, written memoranda or any other written communication pertaining to the care, treatment or observations of *any person* who has died or had any of the *following complications* from any procedure performed by the Defendants: *ectopic pregnancy*, living infant, *retained products of conception, failed abortion, fever* of at least 38C/*100.4F*, amnionitis/decidutis, peritonitis, septicemia, shock-endotoxic, urinary tract infection-cystitis, infection-operative wound, infection-laparoscopy site, infection-injection site, infection-vaginal cuff, foll, hyst, abscess-pelvic, cervicitis, *vaginitis*, pyelonephritis, salpingitis, thrombosis-lower extremities, thrombosis-pelvic, *anemia* (HCT ⟨30 or HGE ⟨10), hemorrhage-uterine at operation, hemorrhage-other sites at operation, hemorrhage-uterine after operation, hemorrhage-other sites after operation, hemorrhage-uterine after delivery, hemorrhage-uterine after discharge, shock-hypovolemic (hemorrhagic), hypotension, perforation-uterine (documented), *perforation-uterine (suspected)*, laceration or injury to cervix, *injury to vagina*, injury to ovary, injury to bladder, injury to uretera, injury to bowel, ruptured ovarian cyst, dehissance-operative wound, paralytic ileus, *urinary retention*, emesis, *pain or cramps-any type*, anaphylaxis (including drug reaction), convulsions-2 to paracervical anesthesia, drug reaction-other type, *other allergic reaction (non-drugs)*, hyponatremia, hypernatremia, water intoxication, hypofibrinogenemia, D.I.C. or hemorrhagic diathesi, hematoma-pelvic, hematoma-other, *uterine anomaly*, subinvo-

lution of uterus, delivery thr lacer [*sic*], of posterior, *regret at having abortion, depression*, suicide gesture or attempt, psychiatric hospitalization, *sought psychiatric care (relat. AB)*, psychotic episode or reaction, atelectasis, myocardial infarction, coma, cardiac arrest, respiratory arrest, convulsion, seizures (not 2), amniotic fluid embolism, pulmonary emolism [*sic*] or infarction, burns from tubal electracauter, other complications attributed to tubal, *other complication, unknown venereal disease, any disorder* of the digestive, urinary, or genital tract or reproductive system.

"(2) Records of all patients who have received any one or more of the following drugs, to wit: methylergon ovine maleatemethergine, oxytocinpitocin or or syntocin." [Emphasis added.] [App. A at 11a-12a.]

SCOPE OF DISCLOSURE ORDER

The final disclosure order has no time cutoff, but dates back to the opening of the first of the five Texas facilities sometime in 1973 after *Roe v. Wade*, 410 U.S. 113 (1973).

The order includes the facilities not only in Dallas where plaintiff-below Claudia Lott was treated, but also those facilities in San Antonio, Corpus Christi, Houston, and El Paso. (App. A at 14a.)

No provision of the order deals with a means for approaching only those patients who want to be interviewed. Only the names are to be deleted from the records, not other identifying characteristics.

Petitioners are restricted under the order from warning former patients that a surprise visit from an investigator may be forthcoming after the records are produced. Order, p. 3. (App. A at 13a.)

The order is in no way limited to patients treated by the physician who saw Mrs. Lott in Dallas.

There is no requirement in the Order of expert evidence to suggest that a chart reveals probable negligence or deception. No such threshold showing need be made before the investigators and subpoenas go out—from El Paso to Dallas.

STATEMENT OF THE CASE

I. FACTS

Reproductive Services, Inc., is a non-profit Texas corporation established after the *Roe v. Wade*[1] decision to work with physicians in setting up low-cost first trimester abortion services. Reproductive Associates, P.A., is a professional corporation composed of physicians licensed to practice medicine and surgery. Both are petitioners here.

From 1973 to date various Reproductive Associates' physicians have performed first trimester abortion procedures upon female patients at the clinic in Dallas where this case arose. Also, the Reproductive Services organizations have established clinics in other Texas cities—Houston, San Antonio, Corpus Christi, and El Paso. The record reflects an estimate that some 70,000 patients have been seen at the Reproductive Services clinics.[2]

In the afternoon of September 17, 1977, Mrs. Claudia Lott[3] appeared as a patient at the Dallas Reproductive

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[1] 410 U.S. 113 (January 22, 1973).

[2] Transcript of Proceedings, at 29, *Lott v. Reproductive Services, Inc.*, No. 78-4488-I (Tex. D. Ct., Dall. Cnty., June 8, 1978).

[3] Mrs. Lott is a real party in interest here.

Services clinic. Her medical records and informed consent form are a part of the record in the case.

Dr. Gardner, a gynecologist who had been associated with Reproductive Associates, P.A., for about three years, performed an abortion procedure upon Mrs. Lott. He used the vacuum aspiration or suction technique.

Complications developed during or after the abortion procedure. Apparently, as the partial record to date shows, there was a perforation[4] of the uterus and bleeding. Mrs. Lott was transferred to Methodist Hospital in Dallas that evening for emergency care. She had surgery, a hysterectomy, and remained in the hospital until the next week.

Eight moths later, on May 15, 1978, Mrs. Lott filed suit against the present petitioners, but not the treating physician.[5] She seeks $1.5 million in damages for injuries allegedly caused by petitioners.

Mrs. Lott's claim sound in tort, informed consent, and alleged malpractice. Her trial lawyers couched the pleadings under a statute that provides counsel fees, treble damages, and injunctive relief, the Texas Deceptive Trade Practices Act, Tex. Bus. & Comm. Code Ann. § 17.41 *et seq.*[6] Mrs. Lott also claimed to proceed on a

[4]The H.E.W. studies of the type cited in *Roe v. Wade*, 410 U.S. 113, 150 n. 44 (1973), suggest that such a complication occurs in from 1 to 7 per thousand first trimester abortions. Cates, Short-Term Complications of Abortion at 12 Weeks Gestation or Earlier, Table 3 (May 24, 1978) (U.S. Dept. of H.E.W., Center for Disease Control). The same H.E.W. study shows a major complication rate of 5 per 1000 for abortions at 11-12 weeks. *Id.*, Table 2.

[5]Reproductive Associates discontinued their relationship with Dr. Gardner sometime after the Lott incident.

[6]*But see* Texas Medical Liability & Insurance Improvement Act, Tex. Public Health Code Ann. § 12.01 which exempts from the Deceptive Trade Practices Act, *supra*, claims of negligence by physicians or health care providers.

class action basis. By agreement, the State of Texas intervened. An agreed temporary injunction was entered. This effectively mooted the injunction issue. The clinic is operating within the terms of the injunction.

The first proceedings took place on June 8, 1978, before Respondent Judge Dee Brown Walker. This was to have been a hearing on Mrs. Lott's request for a temporary restraining order.

Prior to that hearing, Mrs. Lott caused a subpoena to be issued. (App. A at 27a.) She demanded the production of medical records for six patients *named* therein, plus lists of patients who had certain medications and/or named complications.

Objections to the subpoena led to rulings and appeals which have brought Petitioners here.

In this Court petitioners do not address the underlying merits of this malpractice case nor the numerous accusations that trial counsel for Mrs. Lott have made in the proceedings.[7] The issue presented here is a patient's freedom from unconsented intrusion into her private life, medical treatment, and family autonomy.[8]

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[7]Mrs. Lott's trial lawyers accused petitioners of "violat[ing] every law known on the statute books of the State of Texas . . ." and of medical practice that "relates back to the medieval times of about 1800 the way they are practicing medicine out there." Transcript, *supra* note 2, at 20.

Such charges may enjoy a legal privilege under the First Amendment. However, they are no more relevant here than the fact that the year 1800 was not in medieval times.

[8]Respondents argued strenuously below that Petitioners lack standing to assert the right of privacy on behalf of prior patients. However, many patients would otherwise have no way of knowing that their records were under subpoena, until an investigator knocked on their door or served them with a subpoena for a deposition. Their rights will either be asserted by petitioners or

[footnote continued]

II. WHEN AND HOW THE FEDERAL QUESTIONS WERE RAISED AND DECIDED BELOW

At the initial June 8, 1978, hearing, Reproductive Services timely raised the federal questions, by a motion to quash the subpoena. (App. B at 562.) Relying in part on a Texas Attorney General's opinion, counsel stated:

> "[T]he Attorney General goes further and cites not only the Texas statutes but the United States Constitution under the Fourteenth Amendment in protecting the confidentiality of abortion records per se . . ." [App. B at 58a.]
>
> "[T]hese records are privileged not only under the Fourteenth Amendment of the United States Constitution but by virtue of the statutes . . . ." [App. B at 59a.]

The state district court decided otherwise:

> "THE COURT: The thing is. [*sic*] Then I'll rule that you have to produce them and I'll give you an exception to it and go and file a mandamus against me." [App. B at 59a.]

Following a further hearing on June 12, 1978, Respondent Judge Walker issued a written order June 15 overruling the motion to quash. A copy of that order appears in Appendix A, *infra*, at 23a. It directed petitioners to produce vast quantities of patient records and rejected a proffer of the computer printouts on complications and rates of occurrence since September 1977.

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not at all in this lawsuit, for they are not parties. The arguments against standing appear to be put to rest by *Carey v. Population Services Internat'l*, 431 U.S. 678, 682 (1977); *Craig v. Boren*, 429 U.S. 190, 192 (1976); *Singleton v. Wulff*, 428 U.S. 106, 117 (1976); *Planned Parenthood v. Danforth*, 428 U.S. 52 (1976); *Doe v. Bolton*, 410 U.S. 179 (1973); and *Eisenstadt v. Baird*, 405 U.S. 438, 443 (1972).

Reproductive Services, Inc., immediately filed, on June 16, 1978, a Petition for Writ of Mandamus in the Supreme Court of Texas. The Petition appears in pertinent part in Appendix B, *infra*, at 48a. It argued that the trial court

> ". . . committed a clear abuse of judicial discretion by requiring production of privileged documents in direct violation of . . . the Fourteenth Amendment to the United States Constitution, and Texas common-law principles of right of privacy." [App. B at 49a-50a.]

While the Petition for Writ of Mandamus was pending, the District Court reconsidered one part of its June 15 order. The Court held in-chamber proceedings on June 21, 1978, and decided to protect patient names, "but [not] the nature of the cases . . . ." (App. A at 22a.) All other objections by these Petitioners were again overruled. (*Id.*)

A second Petition for Writ of Mandamus was then filed on June 22, 1978. This Petition renewed the federal questions on confidentiality for patients, along with certain state law claims. (App. B at 41a-43a.)

The Texas high court, also on June 22, 1978, temporarily restrained all of the trial court proceedings in this case. (App. A at 8a.)

On the next day, June 23, 1978, without opinion, the Supreme Court of Texas overruled both motions for leave to file petitions for mandamus, and dissolved the temporary injunction. (App. A at 6a.)

Petitioners next applied to this Court for a stay, which was granted by Mr. Justice Brennan on July 10, 1978. This stay was dissolved on July 17, 1978 (App. A at 3a), after representations by the State of Texas that a protective order could be agreed upon to ensure the privacy of patients.

Negotiations produced no agreement. The trial court ultimately entered an order on August 2, 1978 (App. A at 10a) in many respects broader than the earlier one.[9]

Petitioners renewed their application for a stay. On August 21, 1978, Mr. Justice Brennan granted the application. (App. A at 1a.) The federal questions are now squarely before this Court.[10]

REASONS FOR GRANTING THE WRIT

The questions presented are serious and important. They affect tens of thousands of people, and go to the heart of public expectations about confidentiality in medical treatment. Not only are the issues substantial, but the outcome below is seriously out of line with applicable decisions of this Court.

The concept of physician-patient confidentiality dates to the ancient oath of Hippocrates. That part of the oath states:

> "And whatsoever I shall see or hear in the course of my profession . . . if it be what should not be published abroad, I will never divulge, holding such things to be holy secrets." I HIPPOCRATES 301 (1972 Loeb Classical ed.) (W.H.S. Jones transl.)

All state medical societies have statements on physician-patient confidentiality.[11] Indeed, "in 21 states,

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[9]The new order set no time limit and permitted, but established no procedures for, the contacting of non-party patients without notice.

[10]The judgment below could not rest upon an adequate non-federal ground. Both federal and state claims of privilege were explicitly made in the trial court and Supreme Court of Texas. *See, e.g., Staub v. Baxley*, 355 U.S. 313, 318-319 (1958).

[11]Britton, Rights of Privacy in Medical Records, 3 J. Leg. Med. 30 (July/Aug. 1975).

willful betrayal of professional secrets by a physician may be cause for license revocation."[12] While no physician-patient privilege existed at common law, neither did the medical profession or medical science as we know it today.

Forty-three states have some form of testimonial privilege regarding physician-patient communications.[13] Texas, however, is not such a state. Neither the statutes[14] nor case law[15] of Texas extend clear general legal protection from seemingly wholesale disclosure of medical records in judicial proceedings.[16] The only legal source remaining for protection of patients in a case such as this is the right of privacy under the Fourteenth Amendment.

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[12] *Id.* at 32.

[13] Report of the Privacy Protection Study Commission 284 (1977). The Commission recommended that medical information be confidential and not even disclosed by a court unless "necessary to accomplish the purpose for which the disclosure is made." *Id.* 313.

[14] Certain Texas statutes protect medical information under limited circumstances, such as venereal disease test results. Tex. Pub. Health Code Ann. art. 4445c, § 4.

[15] *See, e.g., Hood v. Phillips*, 554 S.W.2d 160, 167 (Tex. 1977) (records on 189 surgery cases ordered produced); *Caddo Grocery v. Carpenter*, 285 S.W.2d 470, 474 (Tex. Civ. App. 1955). ("The doctrine of privileged communications does not extend to physician and patient.")

[16] One line of Texas cases has overruled requests for multiple records in medical cases. *E.g., Jeffcoat v. Phillips*, 534 S.W.2d 168, 174 (Tex. Civ. App. 1976) (pathology reports on all appendectomies by one physician since 1959); *French v. Brodsky*, 521 S.W.2d 670, 676-677 (Tex. Civ. App. 1975) (hospital and medical society records excluded where not pertaining to plaintiff patient). *Hood v. Phillips*, *supra* note 15, however, found a basis for distinguishing those prior cases.

An analysis of the contested disclosure order, set out in this Petition, *supra*, at 4, will show the magnitude and implications of the issues presented by this case.

Seven aspects of the order are particularly overbroad and invasive of legitimate privacy expectations:

1. **Number of Patients Affected**: The Order reaches all patients since 1973 at any one of the five Reproductive Services clinics across Texas who had, inter alia, "regret," "depression," "pain or cramps," "other complication," or "any disorder of the digestive, urinary, or genital tract or reproductive system." This includes the least serious complications, and inevitably reaches thousands of unsuspecting former patients.

Respondents are not unaware of the overbreadth and unreasonableness of their subpoena. An exchange at the June 8, 1978, hearing is revealing:

> "THE COURT: Well, I understand you want what you subpoenaed but you subpoenaed everything in the house."
>
> "MR. AYRES: I tried to.
>
> "THE COURT: I mean, you have got to be reasonable about these fool things. I mean good night." [App. at 59a.]

2. **No Relation to Mrs. Lott's Case**: The order does not focus on the factors alleged to exist in the actual lawsuit at hand—a perforation at the Dallas clinic in 1977 during an abortion performed by a particular physician. Instead, it contemplates discovery in different cities under circumstances wholly unrelated to any claimed by Mrs. Lott. Patients in Corpus Christi with vaginitis or an upset stomach in 1973 are included.

3. **Disclosure of Patient Records**: Respondents may obtain permission to inspect the original medical records

of individuals who have no interest whatsoever in this lawsuit. No criteria are set other than "application to the Court and notice to all parties."

4. **Investigative Discovery of Former Patients:** The order pointedly grants full discovery rights to Mrs. Lott and the Texas Attorney General, but not to these Petitioners. This encompasses all of the enumerated classes of patients. It includes *all* forms of discovery, such as depositions, interviews, and statements.

5. **Absence of Standards:** The order provides no protection to the former patient from abrupt, insensitive, and disastrous intrustions by process servers upon the sanctity of her home.

The idle curiosity of investigators will lead to unwelcome knocks on unsuspecting doors. Those doors may be answered by husbands, fathers, mothers, boyfriends, and others who knew nothing about a woman's private medical care and decision. The investigators may only say:

> "Is Ms. Jones here? I am from the Attorney General's office."

However, the most innocuous introduction will lead to difficult questions and family crises. The order in question allows an investigator to say:

> "Mr. Smith, I am investigating your wife's abortion and whether she gave informed consent. Did she ever discuss her counseling and consent with you?"

Or:

> "Mrs. Adams, I am investigating your daughter's abortion. Do you know whether she had methergine? temperature over 100.4°? any regret?"

Some patients will be mature minors like Mary Moe in *Bellotti v. Baird*, 428 U.S. 132, 137 (1976), who "did

not wish to inform either of her parents." Others will be married women who did not inform their husbands of the pregnancy and abortion. This Court has recognized the family disruption that could follow. As stated in *Planned Parenthood v. Danforth*, 428 U.S. 52, 70 (1976),

> ". . . the decision whether to undergo or to forego an abortion may have profound effects on the future of any marriage, effects that are both physical and mental, and possibly deleterious."

6. **Absence of Procedure for Former Patients To Decline To Be Witnesses:** No procedure exists in the order to allow a patient to refuse to be imposed upon. Never has a discovery order sought to invade the privacy of so many without warning or opportunity to escape. Innocent women who never lived within 500 miles of Claudia Lott will be deposed as potential witnesses for her.

Not all potential consequences of the contested order can be foreseen. Enough is clear, however, to raise grave constitutional questions. Even if patients' names can be kept confidential among a small group, the ensuing investigative process will inevitably become known to family members and friends. The resulting disruption is too great a price to pay for the speculative likelihood that solid, relevant evidence will be found.

Respondents may share this view of respect toward privacy and confidentiality, but only with regard to their client, Mrs. Lott. Respondents persistently refused to disclose even the State in which Mrs. Lott resides[17] and have

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[17] One particular exchange during the June 8, 1978, hearing is instructive:

"MR. WHEATLEY: Well, where – I thought Ms. Lott – Does Ms. Lott live in the State of Texas?

[footnote continued]

refused to make her available for a deposition until all documents were produced and depositions taken of petitioners' principal witnesses.[18]

I. THE PETITION RAISES IMPORTANT FEDERAL QUESTIONS NOT YET DECIDED BY THIS COURT, ON THE EXTENT THAT THE FOURTEENTH AMENDMENT PROTECTS THE CONFIDENTIALITY AND PRIVACY OF A WOMAN FROM INVESTIGATIVE INTRUSION AFTER SHE HAS UNDERGONE AN ABORTION.

This case involves important questions of federal constitutional law not yet determined by decisions of this Court. The facts implicate at least four facets of privacy:

First is the right of privacy with respect to uninvited investigative intrusion. Here, unlike *Whalen v. Roe*, 429 U.S. 589 (1977), the patient may be subject to "affirmative, unannounced, narrowly focused intrusions into individual privacy . . . ," 429 U.S. at 604 n.32. *Cf. Terry v. Ohio*, 392 U.S. 1, 9 (1968); *Katz v. United States*, 389 U.S. 347 (1967).

Both the intrusion and the highly probable disclosure of the investigation to family and friends are factors that raise serious federal questions.[19] The latter relates to a

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"THE COURT: He wants to know if she lives here?

"MR. AYRES: I'm not telling him where she lives."

Transcript of Proceedings, at 84, *Lott v. Reproductive Services, Inc.*, No. 78-4488-I (Tex., D. Ct., Dall. Cnty., June 8, 1978).

[18] *Id.* at 82-84.

[19] The likelihood of a third, more protective disclosure order, is speculative and cannot save the order as written. *Cf. Nixon v. Administrator of G.S.A.*, 433 U.S. 425, 524 (1977) (Burger, C.J., dissenting) ("The constitutionality of a statute cannot rest on the presumed validity of regulations not yet issued . . . .").

second fundamental aspect of privacy, "the individual interest in avoiding disclosure of personal matters . . . ," *Whalen v. Roe*, 429 U.S. 589, 599 (1977). Here there is a danger that medical records of an abortion and the fact of the abortion itself will become known in ever-widening circles.

The record shows that the private Respondent issued a subpoena with six patient names on it, and attempted in a public hearing to interrogate a witness about a named patient other than Mrs. Lott. (App. B. at 45a.) This amounts to "an uncontroverted showing of past harm through disclosure . . . ." *Whalen v. Roe, supra*, 429 U.S. at 604 n.32. *Cf. NAACP v. Alabama*, 357 U.S. 449, 462 (1958).

Even without the element of public disclosure, the intrusion by investigators will inevitably lead to disclosures within the family of far more serious consequence.

A third related aspect of privacy is the requirement that records of medical treament "properly respect a patient's confidentiality and privacy . . . ." *Planned Parenthood v. Danforth*, 428 U.S. 52, 80 (1976). Here some thousands of women face possible subpoenas and depositions before strangers simply because they had an abortion in a particular State at a given clinic. The order is but one small step from requiring that such women submit to physical and mental examinations on their condition. Such a suggestion was condemned by this Court as early as 1891 in an opinion by Mr. Justice Gray:

> "To compel anyone, and especially a woman, to lay bare the body, or to submit it to the touch of a stranger, without lawful authority, is an indignity, an assault, and a trespass . . . ." *Union Pac. Ry. Co. v. Botsford*, 141 U.S. 250, 254 (1891).

Justice Gray distinguished the "very small number of [contrary] cases" as based upon "ancient practice, coming down from ruder ages, now mostly obsolete in England . . . ." *Id.*

A fourth facet of prior concern to this Court in privacy cases is "the interest in independence in making certain kinds of important decisions." *Whalen v. Roe*, 429 U.S. 589, 599-600 (1977). The decision to have an abortion certainly includes a reasonable assumption that privacy will be protected, not invaded, by the law.[20] If Texas imposed a regulation on first trimester abortions requiring any woman with a minor complication to submit to a discovery deposition, that regulation would be invalid under *Roe v. Wade*, 410 U.S. 113, 164 (1973), and *Sendak v. Arnold*, 429 U.S. 968 (1976) (per curiam).

The order in question goes further than the hypothetical. While some flexibility is possible in implementation of the order, "where the consequences of state intervention are so severe, uncertainty must be avoided as much as possible." *Roe v. Wade*, 410 U.S. 113, 208 (1973) (Burger, C. J., concurring).

Publicity in Texas about the Lott case subpoena for medical records could only deter women from exercising the free choice contemplated by *Roe v. Wade, supra*. The opposite effect is inconceivable. The only matter of doubt is the degree of deterrence. One cannot easily quantify these numbers. The record, however, shows that many patients cancelled appointments for abortions as the publicity escalated. Others threatened suit if their records were released. (App. B at 45a-46a.)

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[20] The unfailing choice of patients such as Jane Roe (*Roe v. Wade*), and Mary Doe (*Doe v. Bolton*), and others to seek anonymity as litigants is persuasive evidence of this point.

The right of privacy in this context, however, should not be defeated by an inability to predict the course of individual behavior. As Mr. Justice Stewart stated in *Zablocki v. Redhail*, 54 L.Ed.2d 618, 636 (1978) (concurring opinion), "[t]he invasion of constitutionally protected liberty and the chance of erroneous prediction are simply too great."

In sum, the Petition raises important federal questions of profound national importance, in an area where this Court has extended extensive constitutional protection. The cases on privacy, autonomy, family life, marriage, and procreation are many and varied.[21] At least three major cases touch directly on privacy aspects of medical care and recordkeeping. As shall appear, this case varies sufficiently from *Whalen v. Roe, supra*, to require a different result. Cases such as *Planned Parenthood v. Danforth*, and *Roe v. Wade, supra*, support both the importance of granting the petition and of reversing the judgment below. The rights asserted by petitioners for themselves and the patients most affected are similar to those recognized in a long line of cases as far back as *Union Pac. Ry. Co. v. Botsford*, 141 U.S. 250 (1891).

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[21] *E.g., Zablocki v. Redhail*, 54 L.Ed.2d 618 (1978) (right to marry); *Carey v. PSI*, 431 U.S. 678 (1977) (right of access to contraceptives).

II. THE ORDER BELOW IS IN CONFLICT WITH THE PRINCIPLES OF *ROE v. WADE* AND *PLANNED PARENTHOOD v. DANFORTH*, AND ALLOWS DISCOVERY OF CONFIDENTIAL PATIENT RECORDS AND INFORMATION FAR BEYOND THE EXTENT PERMITTED BY *WHALEN v. ROE*.

Not only are the questions in this case substantial, but they were decided incorrectly by the lower courts.

Planned Parenthood v. Danforth, 428 U.S. 52 (1976), has the principal discussion of the extent the federal privacy right includes a degree of confidentiality. The Court in *Danforth* held:

> "Recordkeeping and reporting requirements that are reasonably directed to the preservation of maternal health and that *properly respect a patient's confidentiality and privacy are permissible.*" 428 U.S. at 80. [Emphasis added.]

Both elements of *Danforth* are absent here.

Maternal health is a legitimate concern. However, coerced interviews with prior patients is a dubious means of promoting maternal health. Numerous other means are available. The method chosen here is the most oppressive imaginable.

Respect for patient confidentiality is also minimal here, although required by *Danforth*. As the pattern has shown, breach of confidentiality has already occurred and is a probable frequent consequence of the order below.

Nothing in *Whalen v. Roe*, 429 U.S. 589 (1977), remotely approaches the order involved here. "That case dealt with the State's undoubted police power to regulate dispensing of dangerous drugs, the very use or possession of which the State could forbid." *Nixon v. Administrator of G.S.A.*, 433 U.S. 425, 533 (1977) (Burger, C. J., dissenting).

Whalen involved a system with numerous official safeguards for patient confidentiality, and utterly no suggestion of unannounced investigative visits to patients.[22] The safeguards here are tenuous at best. Similarly, in *Whalen* the recordkeeping system utilized limited data of specific relevance to a compelling state interest. The order at issue here could not be more sweeping. Its relevance to specific issues in the underlying lawsuit is unclear at best. A computer printout was refused here. (App. A at 24a.)

In addition, the right of privacy in access to abortion is different from any right asserted in *Whalen*. The drugs in that case were "the most dangerous of the legitimate drugs." 429 U.S. at 593. The rights here are fundamental.

A long line of cases show special concern by this Court for matters of privacy, contraception, and abortion. E.g., *Carey v. PSI*, *supra*. That concern does not extend to any "right" to use controlled substances. Here the Respondents must make a stronger showing than they have before dispatching subpoenas to private homes.

The present case concerns those issues left open in *Whalen*. As the Petition shows, the order below does not "evidence a proper concern with, and protection of, the individual's interest in privacy." 429 U.S. at 605. A conflict exists between the order below and the decisions in *Danforth*, *Roe*, and *Whalen*.

Lower courts have faced similar issues in a number of cases:

Williams v. Thomas Jefferson University, 343 F.Supp. 1131 (E.D. Pa. 1972), is closest. There a malpractice

[22] At most in *Whalen* "the stored data may be offered in evidence in a judicial proceeding." 429 U.S. at 600. As Justice Brennan noted, the New York system "includes numerous safeguards intended to forestall the danger of indiscriminate disclosure." *Whalen v. Roe*, 429 U.S. 589, 607 (1977) (concurring opinion).

plaintiff filed interrogatories about women who had therapeutic abortions in 1969. The district court sustained objections similar to those raised here, stating:

> "[I]t is an extremely personal thing to each woman who has had an abortion. The consequences of allowing revelation and examination when considered in terms of family relationships and individual friendships could be disastrous to the subjects of an inquiry of the type plaintiff wants to make." 343 F.Supp. at 1132.

Both the Seventh and Eighth Circuits, as well as two district courts, have invalidated regulations which compromised a patient's confidentiality.

St. Louis at one time required abortion clinics to keep records for official inspection. These were to include patient names and addresses. The Eighth Circuit, in *Word v. Poelker*, 495 F.2d 1349 (8th Cir. 1974), invalidated the entire ordinance for "reflect[ing] no recognition of the fundamental rights involved . . . ." *Id.* at 1351.

A Chicago ordinance required reporting of "[n]ames and addresses of patients with a statement of complications . . . ." This, too, failed to pass constitutional muster in *Friendship Medical Center v. Chicago Board of Health*, 505 F.2d 1141 (7th Cir. 1974), *rev'g* 367 F.Supp. 594, 611 (N.D. Ill. 1973), *cert. denied*, 420 U.S. 997 (1975).[23]

The claim of Respondents is unprecedented. No case has been found from any jurisdiction with such a sweeping demand for discovery into the medical lives

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[23] *See also Hodgson v. Lawson*, 542 F.2d 1350 (8th Cir. 1976); *Mobile Women's Medical Clinic v. Bd. of Commissioners*, 426 F.Supp. 331 (S.D.Ala. 1977); *Doe v. Rampton*, 366 F.Supp. 189 (D. Utah 1973) (three-judge court).

of so many thousands of unsuspecting people. If the order below is left intact, it will be authority for an expansion of discovery in medical litigation that knows no bounds. Every patient of any physician will be subject to depositions on their informed consent and any minor complications.

As this Petition has demonstrated, the judgment below raises important federal questions. Those questions were incorrectly decided below. The judgment now stands in direct conflict with controlling decisions of this Court.

CONCLUSION

For the reasons set out, this Court should grant review.

Respectfully submitted,

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APPENDIX

APPENDIX A
ORDERS & OPINIONS BELOW

SUPREME COURT OF THE UNITED STATES

No. A-1091

Reproductive Services, Inc., Applicant, *v.* Dee Brown Walker, District Judge.	On Renewed Application to Stay an Order of the Supreme Court of Texas.

[August 21, 1978]

MR. JUSTICE BRENNAN.

On July 17, 1978, in a chambers opinion, I stated that "on express condition that the parties agree to a protective order ensuring the privacy of patients at applicant's clinics, the stay I entered on July 10, 1978, in these proceedings is hereby dissolved. If such a protective order is not entered, applicant may resubmit a further stay application."

On August 14, 1978, applicant renewed its application, filing therewith a copy of an order entered August 1, 1978, by respondent, which they alleged did not constitute "such a protective order." Upon examination of said order of August 1, 1978, it is my view that said order

does not constitute "such a protective order." Accordingly, the "express condition" upon which my stay entered on July 10, 1978, was to be dissolved not having been satisfied, said stay of July 10, 1978, is continued in effect pending the timely filing of a petition for certiorari.

Should said petition for writ of certiorari be denied, the stay of July 10, 1978, is to terminate automatically. In the event said petition for writ of certiorari is granted, the stay of July 10, 1978, is to continue in effect pending the issuance of the mandate of this Court.

SUPREME COURT OF THE UNITED STATES

No. A-1091

Reproductive Services, Inc., Applicant, v. Dee Brown Walker, District Judge.	On Application to Stay an Order of the Supreme Court of Texas.

[July 17, 1978]

MR. JUSTICE BRENNAN.

I have before me an application[1] to stay an order of the Supreme Court of Texas, which denied applicant's motion for a writ of mandamus directed to respondent. The questions at issue here arise in a suit brought by Claudia E. Lott against applicant, which in essence charged applicant with medical malpractice in performing an abortion on Mrs. Lott. The complaint further charged applicant with violating the Texas Deceptive Trade Practices-Consumer Protection Act, Texas Bus. & Comm. Code Ann. § 17.41 *et seq.* (Supp. 1977), in that applicant misrepresented the quality of care it was prepared to provide and failed to disclose material information regarding the risks involved in procedures used at applicant's abortion clinics. The State of Texas was allowed to intervene in this action pursuant to the Deceptive Prac-

[1] This application was originally presented to Mr. Justice Powell, as Circuit Justice and, in his absence, was referred to Mr. Justice Rehnquist, who denied the application.

tices Act. Mrs. Lott and the State of Texas are the true parties in interest here.

Mrs. Lott caused a subpoena *duces tecum* to be issued against applicant. This subpoena sought the medical records of five named patients at applicant's clinics and also sought the medical records of any other patient who had any major or serious complications arising from an abortion at applicant's clinics or who had received certain medications. Applicant sought to quash this subpoena on the ground of invasion of its patients' privacy. This motion was granted in part by the respondent trial judge, who ruled that the records must be turned over, but that patient names could be deleted. Applicant sought mandamus in the Supreme Court of Texas to overturn this order. Subsequently counsel for applicant, Mrs. Lott, and the State of Texas entered a consent order and temporary injunction in which applicant agreed that on determination of applicant's petition for mandamus the State could take discovery "on all names of all patients of [applicant's] clinics throughout the State and all records on the nature of the conditions shown in those records."

The question sought to be raised by applicant—whether the names of abortion patients can be obtained by discovery for use in a civil suit against a person or clinic performing abortions where, as here, the parties have not agreed to a protective order to ensure the privacy of those patients—is a serious one. If this question were in fact presented by this case, I am of the view that four Members of this Court would vote to grant certiorari to hear it.[2] However, this issue is not presented here. First, the order of the trial court challenged by applicant's

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[2] Applicant has styled his application as one for a stay pending petition for mandamus, but the appropriate avenue of relief would be by certiorari and I so read the papers.

petition for mandamus did in fact provide that the names of applicant's patients could be deleted. Second, the State of Texas has represented in its response in this Court that it is prepared to enter into a protective order which will ensure the privacy of all patients at applicant's clinics. In light of the representations of the State of Texas, there is no irreparable injury to any patient's privacy interests which would justify a stay of the order of the Supreme Court of Texas.

Therefore, on express condition that the parties agree to a protective order ensuring the privacy of patients at applicant's clinics, the stay I entered on July 10, 1978, in these proceedings is hereby dissolved. If such a protective order is not entered, applicant may resubmit a further stay application.

IN THE SUPREME COURT OF TEXAS

No. B-7680

Reproductive Services, Inc.

v. Original Mandamus

Hon. Dee Brown Walker, Judge

[June 23, 1978]

Relator's motion for leave to file petition for writ of mandamus filed herein on June 16, 1978, having been duly considered, it is ordered that said motion for leave to file be, and hereby is, overruled.

It is further ordered that the Temporary Writ of Injunction issued by this Court on June 22, 1978 be, and hereby is, dissolved in the above numbered and entitled case.

It is further ordered that relator, Reproductive Services, Inc., pay all costs expended and incurred in this Court in this case.

No. B-7694

Reproductive Services, Inc.

v. Original Mandamus

Hon. Dee Brown Walker, Judge

[June 23, 1978]

Relator's motion for leave to file petition for writ of mandamus filed herein on June 22, 1978 in the above numbered and entitled cause, having been duly considered, it is ordered that said motion for leave be, and hereby is, overruled.

It is further ordered that relator, Reproductive Services, Inc., pay all costs expended and incurred in this Court in this case.

IN THE SUPREME COURT OF TEXAS

No. B-7680

Reproductive Services, Inc. Relators *v.* Dee Brown Walker, District Judge Respondent	From Dallas County 162nd Judicial District

ORDER

WHEREAS, on June 16, 1978, Relators filed a motion for leave to file Petition for Writ of Mandamus in the above numbered and styled cause; and

WHEREAS the Court took Relators Motion under consideration and called upon Respondent to Reply on or before June 23, 1978; and

WHEREAS on June 22, 1978, this Court duly considered Relators Application for Temporary Injunction and it appearing to the Court that such Application should be granted to protect the jurisdiction of this Court and the subject matter of said Petition for Writ of Mandamus; it is hereby,

ORDERED that the writ of injunction issue to protect this Court's jurisdiction in the above numbered and styled Petition for Writ of Mandamus pending disposition; and it is further,

ORDERED that the Honorable Dee Brown Walker, District Judge of the 162nd Judicial District Court of Dallas County, Texas, discontinue the temporary injunction hearing in Cause No. 78-4888-I set for June 22, 1978 and refrain from further proceedings therein until such time as this Court acts on the above numbered and styled Petition for Writ of Mandamus.

WITNESS the Honorable Joe R. Greenhill, Chief Justice of our said Supreme Court, with the Seal thereof annexed, at the City of Austin, this the 22nd day of June, 1978.

GARSON R. JACKSON, Clerk

By _____
Mary M. Wakefield, Deputy

No. 78-004488*

Claudia E. Lott *v.* Reproductive Services, Inc. and Reproductive Associates, P.A.	In the District Court of Dallas County, Texas 162nd Judicial District

ORDER TO PRODUCE DOCUMENTS AND OTHER THINGS FOR INSPECTION AND COPYING

On this 2nd day of August, 1978, in the above entitled and numbered cause, came the State of Texas, Plaintiff-Intervenor, represented by the Attorney General of Texas, John L. Hill, Plaintiff, Claudia E. Lott, represented by her attorneys G. H. Kelsoe and Jack R. Ayers, and the Defendants, Reproductive Services, Inc., represented by Seagal Wheatley, and Reproductive Associates, P.A., represented by Richard Sayles, to be heard on Plaintiff-Intervenor's Motion for the production of documents and other tangible things. The Court having heard the evidence and arguments of counsel is of the opinion and finds that said Motion is well taken and should be granted. In this regard the Court finds that the documents, records, tangible items and information sought to be produced are material, relevant and important to the issues involved herein and that Defendants, Reproductive Services, Inc. and Reproductive Associates, P.A. should be compelled to produce the following materials and information:

*The correct number is 78-4488-I.

(1) All medical records, incident reports, written memoranda or any other written communication pertaining to the care, treatment or observations of any person who has died or had any of the following complications from any procedure performed by the Defendants: ectopic pregnancy, living infant, retained products of conception, failed abortion, fever of at least 38C/100.4F, amnionitis/decidutis, peritonitis, septicemia, shock-endotoxic, urinary tract infection-cystitis, infection-operative wound, infection-laparoscopy site, infection-injection site, infection-vaginal cuff, foll, hyst, abscess-pelvic, cervicitis, vaginitis, pyelonephritis, salpingitis, thrombosis-lower extremities, thrombosis-pelvic, anemia (HCT ⟨30 or HGE ⟨10), hemorrhage-uterine at operation, hemorrhage-other sites at operation, hemorrhage-uterine after operation, hemorrhage-other sites after operation, hemorrhage-uterine after delivery, hemorrhage-uterine after discharge, hemorrhage-other after discharge, shock-hypovolemic (hemorrhagic), hypotension, perforation-uterine (documented), perforation-uterine (suspected), laceration or injury to cervix, injury to vagina, injury to ovary, injury to bladder, injury to uretera, injury to bowel, ruptured ovarian cyst, dehissance-operative wound, paralytic ileus, urinary retention, emesis, pain or cramps-any type, anaphylaxis (including drug reaction), convulsions-2 to paracervical anesthesia, drug reaction-other type, other allergic reaction (non-drugs), hyponatremia, hypernatremia, water intoxication, hypofibrinogenemia, D.I.C. or hemorrhagic diathesi, hematoma-pelvic, hematoma-other, uterine anomaly, subinvolution of uterus, delivery thr lacer [*sic*], of posterior, regret at having abortion, depression, suicide gesture or attempt, psychiatric hospitalization, sought psychiatric care (relat. AB), psychotic episode or reaction, atelectasis, myocardial infarction, coma, cardiac

arrest, respiratory arrest, convulsion, seizures-(not 2), amniotic fluid embolism, pulmonary embolism or infarction, burns from tubal electracauter, other complications attributed to tubal, other complication, unknown venereal disease, any disorder of the digestive, urinary, or genital tract or reproductive system.

2. Records of all patients who have received any one or more of the following drugs, to wit: methylergon ovine maleatemethergine, oxytocinpitocin or syntocin.

3. Copies of any internal corporate records or internal memoranda including but not limited to the minutes of any board, committee, staff or any other group meetings relating to the death of any patient or medical complications resulting from any abortion procedure.*

IT IS FURTHER ORDERED that the documents and tangible things referred to in paragraph 1, 2, and 3, above shall be produced under the following conditions:

A. The Defendants shall deliver to the Court for safekeeping the originals of all such material and tangible things;

B. The Defendants shall simultaneously deliver to the Court a coded list, identifying each patient whose name appears in any and all of the records ordered to be produced in item (A) above by anonymous numerical designation;

C. The Defendants shall deliver to counsel for Plaintiff and Plaintiff-Intervenor duplicate originals of all materials and tangible things ordered to be produced in item (A) above, provided, however, that the names of the patients contained in such copies shall be deleted and that such duplicate originals shall be identified by the appropriate anonymous numerical designation;

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*Petitioners agreed to this production, and to items 4-6. (App. B at 32a.)

D. That Plaintiff and Plaintiff-Intervenor shall have a period of not more than sixty (60) days following production of the above items, unless extended for good cause shown, within which to review the material furnished them in items A, B, and C above. During the sixty (60) day period stated above, counsel for Plaintiff, or Plaintiff-Intervenor may, upon application to the Court, be granted permission to inspect or examine the original documents or tangible things subject to the protective provisions provided hereafter concerning the use or disclosure of any patient's name.

IT IS FURTHER ORDERED that the next thirty (30) days following the initial production of documents by Defendants that the parties hereto and all counsel and others acting in concert with them shall not communicate or cause to be communicated with any patient whose records are subject to this order regarding this action or any matter related to such individual's contact with, care, or treatment by the Defendants.

IT IS FURTHER ORDERED that Reproductive Services, Inc. and Reproductive Associates, P.A. produce the following materials and information:

4. The original and one copy of all materials prepared for training, use or benefit of abortion counselors, including but not limited to, all staff manuals, policy and procedure manuals, advertising materials, instruction materials and training manuals.

5. Copies of all advertising run by Defendants or ads in the possession or control of the Defendants run by any other organization which refers patients to Reproductive Services, Inc. or Reproductive Associates, P.A. and all written materials distributed to patients or prospective patients.

6. Copies of all agreements, contracts, consultations or evidence of associations or affiliations of any type with any physician, professional associations, registered nurses or any other allied health professionals.

7. Copies of the complete personnel files from 1973 to present of all past and present employees of the Defendants, Reproductive Services, Inc. and Reproductive Associates, P.A.

IT IS FURTHER ORDERED that the Defendants produce the papers, documents, records and other tangible items described above in items (1) through (7) with respect to all of the corporate and clinic facilities according to the following schedule:

(a) Those items described in the above numbered paragraphs (1)-(7) pertaining to the Dallas Clinic shall be produced on or before the 1st day of September, 1978.

(b) Those items described in the above numbered paragraphs (1)-(7) pertaining to the San Antonio Clinic shall be produced on or before the 15th day of September, 1978.

(c) Those items described in the above numbered paragraphs (1)-(7) pertaining to the Corpus Christi Clinic shall be produced on or before the 29th day of September, 1978.

(d) Those items described in the above numbered paragraphs (1)-(7) pertaining to the Houston Clinic shall be produced on or before the 13th day of October, 1978.

(e) Those items described in the above numbered paragraphs (1)-(7) pertaining to the El Paso Clinic shall be produced on or before the 27th day of October, 1978.

The Court further finds that for the purpose of protecting the anonymity of any and all of Defendants' patients to the extent possible while allowing Plaintiff and Plaintiff-Intervenor the right to prepare its case for trial, that the following Order should be entered:

It is therefore further Ordered, that the identities of any and all of Defendants' patients contained in any document, paper, book, account, letter, record, chart or any other object or tangible thing required to be produced by Defendants shall be revealed to no other persons than the following:

(1) Judge Dee Brown Walker

(2) Court personnel designated by Judge Dee Brown Walker

(3) The following counsel:
   (a) Mr. Seagal Wheatley
   (b) Mr. Richard A. Sayles
   (c) Mr. George Kolb
   (d) Mr. B. Prater Monning, III
   (e) Mr. Tom J. Stollenwerck
   (f) Mr. Roy Lucas
   (g) Mr. G. H. Kelsoe, Jr.
   (h) Mr. Jack R. Ayers, Jr.
   (i) Mr. Joe G. Chumlea
   (j) Ms. Mannette A. Dodge
   (k) Mr. Bill Flanary

(4) Experts and clerical and investigative staff designated by above mentioned counsel

(5) Any court reporter retained or appointed to record testimony in any proceeding herein.

It is further Ordered, Adjudged and Decreed that the testimony of any and all of Defendants' patients in any

proceeding herein shall be taken in the presence of no persons other than those designated hereinabove.

It is further Ordered, Adjudged and Decreed that any reference in any proceeding herein to any of Defendants' patients which discloses or would lead to the disclosure of the identities of such patients including, but not limited to, references by witnesses, counsel, and the Court, shall be made in the presence of no persons other than those designated hereinabove.

It is further Ordered, Adjudged and Decreed that any transcript of the testimony taken in any proceeding herein of any of Defendants' patients, testimony which discloses or would reasonably lead to the disclosure of the identities of Defendants' patients, and any notice, subpoena or other document of process which discloses or would reasonably lead to the disclosure of the identities of Defendants' patients shall be filed under seal, any such transcripts or documents to be opened only by those persons authorized to learn the identities of Defendants' patients as provided hereinabove on Order of the Court.

It is further Ordered, Adjudged and Decreed that any reference by any person in any proceeding herein to any of Defendants' patients made in the presence of persons other than those designated hereinabove including, but not limited to, references by witnesses, counsel, and the Court, shall refer to such patients by numerical designation as Patient No. 1, Patient No. 2, etc., in order of such patients' appearances or in order of the appearance of documents or other tangible things which would reveal such patients' identities. Further, all papers filed, other than these sealed transcripts of testimony shall refer to Defendants' patients by their numerical designation only.

It is further Ordered, Adjudged and Decreed that nothing contained in this Order shall in any way prevent counsel for Plaintiff or Plaintiff-Intervenor from conducting full and complete discovery in preparation for this lawsuit as concerns the taking of testimony, interviews, the taking of statements, examination of documents, and any other discovery counsel for Plaintiff and Plaintiff-Intervenor shall deem necessary. Further, nothing contained in this Order shall in any [way] prevent counsel for Plaintiff-Intervenor from disclosing any and all information reasonably related to possible violations of any state or federal statute including the identities of Defendants' patients to the appropriate law enforcement agency.

Signed this the _____ day of _____, 1978.

/s/ Dee Brown Walker
District Judge Presiding

No. 78-4488-I

Claudia E. Lott v. Reproductive Services, Inc. and Reproductive Associates, P.A.	In the District Court of Dallas County, Texas 162nd Judicial District

STIPULATION

IT IS AGREED AND STIPULATED AS FOLLOWS:

I

That Items 1 through 20 so enumerated in the Agreed Temporary Injunction are not admissions by my client that any of the facts or conclusions recited in Paragraphs 1 through 20 have in fact occurred.

II

That by the entry of the Agreed Temporary Injunction, my client will not be admitting that the actions have occurred and that the Agreed Temporary Injunction will not be used as evidence that such actions have occurred in any proceedings in this cause; and

III

I understand that from Mr. Kelsoe's announcement a moment ago that the Claudia Lott's case as it related to Claudia Lott would not proceed any further at this time, and of course our client would fully cooperate with the Attorney General's investigation; and

IV

That any depositions taken in the cause would not be filed with the Clerk's office where they would be subject to public disclosure without motions being filed and due notice and hearing as to the disclosure of such depositions; and

V

That until the Texas Supreme Court rules on the pending petitions for writs of mandamus, that my client would not be obligated to disclose the matters which we have complained of in two petitions for writs of mandamus.

IT IS FURTHER STIPULATED AND AGREED that no discovery will be had or taken in the case until the Supreme Court has ruled on the writs of mandamus now pending before it or any other writs that may be filed by Defendants in this case at a subsequent time; however, once a ruling has been had from the Supreme Court, discovery will be taken on all names of all patients of the Clinics throughout the State and all records on the nature of the conditions shown in those records would be discoverable by the State of Texas, subject to any orders of the Supreme Court.

IT IS FURTHER STIPULATED AND AGREED that this action was without prejudice to further discovery on the class action filed by the Plaintiff herein, subject also to the further orders of the Supreme Court.

SIGNED AND ENTERED this 22nd day of June, 1978.

/s/ Dee Brown Walker
Judge

Seagal V. Wheatley
Attorney for
Reproductive Services,
Inc.

G. H. Kelsoe, Jr.
Attorney for
Claudia E. Lott

Richard A. Sayles
Attorney for
Reproductive Associates,
P.A.

Bill Flanary,
Assistant Attorney
General
Attorney for
State of Texas

No. 78-4488-I

Claudia E. Lott

v.

Reproductive Services, Inc.
and Reproductive Associates,
P.A.

In the District Court
of Dallas County, Texas
162nd Judicial District

APPEARANCES:

Messrs. G. H. Kelsoe, Jr.
and R. Jack Ayres, Jr.
For the Plaintiff

Messrs. Seagal V. Wheatley
Roy Lucas and Richard A. Sayles
For the Defendants

EXCERPT OF PROCEEDINGS had in the above numbered and entitled cause on the 21st day of June, 1978, before the HONORABLE DEE BROWN WALKER, Presiding Judge of the 162nd Judicial District Court of Dallas County, Texas, to-wit:

PROCEEDINGS

(In part)

[2] THE COURT: Overruled. Let's go on.

MR. WHEATLEY: May I continue, Your Honor, because this is a very important –

THE COURT: All right.

MR. WHEATLEY: – part of the case we are on right now.

I would like to reurge upon the Court at this time my motion and objections to keep out any evidence of the patients or nature of their cases.

I would like to move the Court to re-consider the objections of the parties made to keep out of evidence the patient's names or nature of the cases.

THE COURT: I'll sustain it as to the patients' names, we'll just use numbers, but the nature of the case I'll overrule.

******

MR. WHEATLEY: I have 24 hours I have got to file the writ, and I will have it filed no later than Friday afternoon and put the manpower on it to do it, but back to the fundamental question –

THE COURT: I don't know the question - I don't think the question about - it seems to me the only question that could be raised has been raised by you. I have read your [3] motion here on your application is whether or not you have got to release these records. It's not whether or not he can find it from some other source and get it before the Court. That seems to me to be the point.

MR. AYRES: That's right.

THE COURT: That's what I thought we were doing. I didn't know what the proof was going to be myself.

******

[Caption Omitted in Printing]

No. 78-4488-I

Claudia E. Lott v. Reproductive Services, Inc. and Reproductive Associates, P.A.	In the District Court Dallas County, Texas 162nd Judicial District

ORDER OVERRULING MOTION OF REPRODUCTIVE SERVICES, INC., TO QUASH SUBPOENA DUCES TECUM

On the 8th day of June, 1978, came on to be heard the Motion of Reproductive Services, Inc. to quash the subpoena duces tecum, which subpoena was directed to and served upon Jerry McNeely, the Clinic Director of Reproductive Services, Inc.'s Dallas Clinic, and is attached hereto as Exhibit "A". During the course of the hearing on such Motion, Reproductive Services, Inc. again objected strenuously to producing specific items subpoenaed which were as follows:

> "All records concerning the care and treatment of [6 patient names deleted] . . . ."

because the tender of any such abortion records as so subpoenaed would reveal the names, identities, addresses, or patient files of any patients who may have undergone an abortion at Defendant's clinic.[1] Defendant

[1] Defendant tendered to Plaintiff's counsel at the hearing the patient file on the Plaintiff, Claudia E. Lott, because her attorneys, with her consent, requested such file in this suit.

offered to produce in lieu thereof a computer printout summary listing the total number of all patients undergoing abortions who have complained of complications, such computer printout also listing each category of complications complained of during the period September, 1977 to the present date, that being the entire period during which Reproductive Services, Inc. has had the services of a computer. The computer printout did not reveal the patient's name, identity, address, or contents of the patient's file. Said computer summaries were tendered by Reproductive Services, Inc. to the Court and furnished to the attorneys for Plaintiff and a copy of such summary is attached hereto as Exhibit "B".

After having duly considered such Motion and the arguments for and against the same, The Court is of the opinion that such Motion should be overruled and refused to the extent set forth below. Accordingly, it is hereby

ORDERED that the Motion of Reproductive Services, Inc. to quash the Plaintiff's subpoena as to the specific items quoted above is overruled to the extent set forth below, and co-Defendant, Reproductive Services, Inc. is hereby ordered to forthwith deliver to Plaintiff's counsel all records concerning any care and treatment of [5 patient names deleted] and all other records subpoenaed by the Plaintiffs, as limited below.

IT IS ORDERED that the subpoena served on Jerry McNeely is hereby limited and restricted to requiring the production of the following items, to-wit:

(A) the records concerning the care and treatment of [5 patient names deleted].

(B) the medical records, incident reports, tangible data or written memoranda concerning care, treatment of any person who has died, was hospitalized or had any major or serious complication(s) from any procedure performed by the defendants, including but not limited to perforation of uterus or the cervex [*sic*], excessive or unusual hemorrhage, infection or who has been given any one or more of the following medicines, to-wit: methylergon, ovine maleate-methergine, oxytocin-pitocin or syntocin within the last 12 months.

(C) copies or originals of all manuels [*sic*], training manuels, staff manuels, policy and procedures of defendants, advertising materials, billboards, ads or other such items of the defendants in the past 12 months.

(D) copies of all documents reflecting compensation or consideration or consideration [*sic*] from clients or patients of the defendants and/or Nova Health Systems Inc. or any other entity which show or purport to show payments to doctors or professional associations or registered nurses or any other allied health professional in the past 12 months.

(E) all copies of personnel files of all employees employed or compensated in the past 12 months.

To all of such action the co-Defendant, Reproductive Services, Inc. duly excepted and gave notice of its intention to file an Application for Writ of Mandamus as to this Order. The Court being advised of the intention of the co-Defendant, Reproductive Services, Inc. to seek such relief, further ordered and hereby orders that the five files above named in question excepting Claudia E. Lott be sealed by the Court and transmitted by the Clerk of this Court to the Clerk of the Supreme Court

of Texas along with all exhibits tendered in evidence in this proceeding as evidenced by [the] Statement of Facts, and it is further ordered that the Court Reporter of this Court, upon request heretofore made by Reproductive Services, Inc. immediately prepare a record of all proceedings in this case as of the date of this Order for inclusion in the record for the purpose of the Writ of Mandamus review.

SIGNED AND ENTERED this 15th day of June, 1978.

/s/ Dee Brown Walker
Judge

THE STATE OF TEXAS

To any Sheriff or any Constable of the State of Texas—
GREETING:

You are hereby commanded to summon and tender: $1.00

Mrs. Jerry McNeeley
Reproductive Services, Inc.
2339 Inwood, Suite 33
Dallas, Texas

to be and appear before the District Court of Dallas County, 162nd Judicial District of Texas, to be held at the Courthouse, in said County, on the 8th day of June A.D. 1978, at 10:00 o'clock A.M., then and there to testify as a witness in behalf of the Plaintiff in a civil action pending before said Court, entitled and numbered on the Civil Docket of said Court,

Claudia E. Lott

v.

Reproductive Services, Inc., et al.

No. 78-4488-I, and that he bring with him and produce in said Court, at said time and place:

All records concerning the care and treatment of [6 patient names deleted] and all medical records, incident reports, tangible data or written memoranda concerning the care and treatment of any person who has died, had any complications or complained of complications from any procedure performed by the Defendants, including but not limited to perforation of the uterus or the cervix, excessive or unusual hemorrhage, infection, within the last 24 months a list of all patients who have received any one or more of the following medicines, to-wit: methylergon ovine maleate-methergine, oxytocin-pitocin

or syntocin; an original and one copy of all materials prepared or used by the Defendants, or any persons acting on their behalf for the supposed training, use or benefit of abortion counselors, including but not limited to all staff manuals, policy and procedure manuals, advertising materials, instruction materials, training manuals, copies of all billboard ads or ads run by any other organization who refers patients to Reproductive Services, Inc., copies of all documents reflecting any compensation or consideration from the clients or patients of Reproductive Services, Inc., Nova Health Systems, Inc. or any other entity connected with Defendants which show or purport to show payments made to any physician, professional association, registered nurses, or any other allied health professional, copies of the complete personnel files of all employees of the Defendants' Dallas office and all physicians employed or compensated by either of the Defendants during the past 24 months, all medical records, incident reports, tangible data or written memoranda concerning any person to the knowledge of the witness who has died, become ill or had complications from any procedure performed by the Defendants.

APPENDIX B

SIGNIFICANT PLEADINGS AND RECORD EXCERPTS

[1]* No. 78-4488-I

Claudia E. Lott v. Reproductive Services, Inc. and Reproductive Associates, P.A.	In the District Court of Dallas County, Texas 162nd Judicial District

[APPEARANCES DELETED]

PROCEEDINGS had in the above numbered and entitled cause on the 31st day of July, 1978, before the HONORABLE DEE BROWN WALKER, Presiding Judge of the 162nd Judicial [2] District Court of Dallas, Dallas County, Texas, to wit:

[3] PROCEEDINGS

THE COURT: Everybody ready? What do we have here, Gentlemen?

MR. CHUMLEA: All right, Your Honor, the State has submitted a Motion to Produce Documents and other tangible items to the Court today, and I would like to explain I think where we are today.

*Transcript pages appear in brackets [ ].

The State has requested production of seven enumerated items of documents and other tangible items.

The State and Reproductive Services, Incorporated have reached an agreement as to the production of I think it is five of the seven, I'm sorry, four of the seven items that are identified in the Motion and these specifically relate to Items 3 –

THE COURT: Let me find your motion.

MR. CHUMLEA: All right.

THE COURT: Motion to Produce Documents. All right, I've got it.

MR. CHUMLEA: Okay, the corporation and the State have reached an agreement that the corporation will provide and produce Items 3, 4, 5 –

THE COURT: 3, 4 –

MR. CHUMLEA: – 5 and 6 and with respect –

[4] THE COURT: 3, 4, 5 and 6. All right.

MR. CHUMLEA: Okay, with respect to Items 1, 2 and 7, we are urging our motion at this time and would testify that the materials, documents and tangible items identified and designated in Paragraphs 1, 2 and 7 are material and relevant to the substantiation of Intervenor-Plaintiff's case in this matter, specifically with reference to its allegations in Paragraphs 1, 2, 3, 4, 5, 6, 9, 10 and 11 in Plaintiff's Original Petition.

We have attached a protective order which we are requesting the Court enter so that the patient, any patient names identified in the records and the documents requested, the identity of the patients will be disclosed only to the Court, the respective attorneys representing the parties to this matter, the designated court personnel

designated by the Court and agents of the respective parties to be identified as investigators, staff, clerical staff and expert witnesses.

THE COURT: Okay.

MR. CHUMLEA: The State would request that a protective order be entered today with respect both to the items to be produced by [5] agreement as well as our request for the items identified in Paragraphs 1, 2 and 7.

We would also request that some changes be made to the protective order that we have submitted and we are prepared to identify those changes at this time.

Ms. Dodge will enumerate those changes if the Court wants to hear that at this time.

THE COURT: Do you want to change the order?

MS. DODGE: Well, we want to make some minor changes in the order, Your Honor.

THE COURT: Where is that?

MS. DODGE: On Item 4 in the third paragraph, a list of those by whom discovery may be made –

THE COURT: Huh?

MS. DODGE: – Item 4 says agents designated by the above mentioned counsel. We want to enumerate the classes of agents that will be allowed as being experts and clerical and investigative staff.

THE COURT: All right, what else?

MS. DODGE: And then we would like to [6] incorporate into the order, not any particular order here but we have provided that the transcript of testimony would be sealed. We would also like to include any subpoena or notices of discovery, there will be no public notice –

THE COURT: That will be good.

MS. DODGE: The envelope will be sealed.

And then in the very last paragraph on Page 2, we state there reserve the right to turn over any materials discovered in the process to State and Federal law enforcement agencies. We have amended that to include voluntary disclosure.

THE COURT: Okay.

MS. DODGE: We would not voluntarily disclose that material without a court hearing and order, however, leaving the requirement that we are to be subpoenaed for the material that we could turn that over.

THE COURT: All right, thank you.

Are you in agreement with this Mr. Kelsoe, or do you want more than this?

MR. KELSOE: If Your Honor please, we on behalf of the Plaintiff, Claudia Lott, would like to adopt the Motion to Produce Documents as filed [7] in this cause by the State of Texas in their position as intervenor and we are in agreement, Your Honor, with the agreement reached between the State and Reproductive Services at this time with reference to Items 3, 4, 5 and 6.

We would like it understood and be agreed that we will have the same right of inspection as granted to the State under the order with reference to these agreed Items 3, 4, 5 and 6.

THE COURT: All right, Mr. Wheatley?

MR. WHEATLEY: May it please the Court?

THE COURT: What is your reaction to this?

MR. WHEATLEY: It is true as stated by the State that we have agreed on behalf of Reproductive Services, Inc. and I would stress again this is the clinic and not the professional group of doctors that I represent.

THE COURT: Yeah.

MR. WHEATLEY: We have agreed to the production of certain documentary evidence.

THE COURT: Let me think of something now. The doctors don't have any records other than your records, do they?

MR. WHEATLEY: I don't know, Your Honor, their attorney is here, Mr. Sayles.

[8] THE COURT: I had forgotten.

MR. WHEATLEY: These are as I understand the records that are in the possession of the clinic who is my client.

THE COURT: That's really all you want, isn't it, the clinic's records?

MR. CHUMLEA: Your Honor, any records that are designated in the motion that would be in the possession of the doctors will be requesting also. Now it may be that they don't, you know, have any.

THE COURT: Yeah, what about it, do you know? Do they have records?

MR. SAYLES: Your Honor, I don't know that they do they have records and so far we have not been a party to the motions concerning protection because we have not known of records that had patient names in them.

THE COURT: Okay, he's not a party to it then, okay. That solves that.

MR. KELSOE: He's a party to the lawsuit, Judge, and he's a party to this motion because Item 7 asks specifically with reference to copies of internal corporate records or internal memoranda including but not limited to the minutes of any [9] board, committee, staff or any other

group meetings relating to the death of any patient or medical complications.

Such information is material and so forth with respect to its allegations of the Defendants, Reproductive Services and Reproductive Associates, P.A., so I think, Your Honor, that most of these –

THE COURT: I guest you are a party to the motion.

MR. KELSOE: – would apply to both.

THE COURT: Let's consider you are a party to the motion so you don't have to come back here again.

Go ahead, Mr. Wheatley.

MR. WHEATLEY: All right, and so as to Items 3, 4, and 6, Your Honor, the parties will prepare and present to Your Honor an agreed order setting forth those items that the State mentioned as well as what we hope will be an agreed protective order on Items 3, 4, 5 and 6.

We are prepared to begin that on August 14 to begin delivering of those documents.

We do not and cannot agree [10] as to Items 1, 2 and 7 of the Motion to Produce principally because Items 1, 2 and 7 relate directly to the identity of the patients' names which is the same problem we had in this case earlier on.

Items 3, 4, 5, and 6 relate generally to the counselors' manuals that are used, any advertising that the clinic does and things of that nature that would not jeopardize the identity of patients.

Now we have prepared in response to Items 1 and 2 and I would add verbally in our argument this morning Number 7, we have prepared a response setting forth to Your Honor very detailed reasons why we object to 1, 2 and 7. 1, 2 and 7 ask for the identity and names of

patients at the clinic which the State and the Plaintiff have advised me this morning that they want to obtain.

Now if you read the State's Motion to Produce which the Plaintiffs have also adopted, you will find at the outer limits of their motion, and it would be permitted by this Court for you to go to the outer limits with them, they would be entitled and they are seeking the names of patients and they want the right to go out and conduct interviews of those patients and take statements by [11] agents, and agents as the State advised you this morning does include investigators, and it seems to me without conjuring up any situation other than what is real is that if you enter this order, an agent, a private investigator of the Plaintiffs, a private investigator of the State, unknown to us, we don't know his name, has the right if we give the name of the patient to the Plaintiffs to go out and conduct an ex parte interview of that patient. Now that to me files right in the face of the type of agreement that we were hoping to strike per Justice Brennan's opinion which would meet the standards of as he said insuring the privacy of the patient.

THE COURT: The thing that bothers you is to see how you can go on with the lawsuit and not get this information. Now we can keep, we can keep the names of the patients out of the press. That's what I was trying to do, but if they can't use the information that's in the files and all, I don't know how they can go on with their lawsuit.

MR. WHEATLEY: Well, they can do it very easily, and I would add that keeping a patient's name out of the press is really not the total constitutional protection that that woman is [12] entitled to. I have suggested in my response what we considered to be a more rational approach to this which would at the same time permit

the State and the Plaintiffs to conduct discovery but at the same time kind of balance it against the woman's right to privacy and what we have suggested is this procedure which at least to me would make some sense, and let me explain briefly before I get to the procedure why I think it makes sense.

We are not talking about just a routine damage suit I suppose where a lawyer wants to go out and interview witnesses or what have you, but I think you are well aware of the constitutional dimensions which this question has, and –

THE COURT: I had a lawyer here defending a malpractice case who told me, his name is Larry Anderson, these fellows know him but you wouldn't probably, but it was in the Federal Court in El Paso and they used codes out there but they got the information from the files of the various patients but they used codes so that the names of the people were not revealed in the lawsuit.

You feel like the right of privacy goes past that?

MR. WHEATLEY: Yes.

No. B-7694

IN THE
SUPREME COURT OF TEXAS

REPRODUCTIVE SERVICES, INC.
Relator,

v.

DEE BROWN WALKER
District Judge of the
162nd Judicial District Court
of Dallas County, Texas
Respondent.

PETITION FOR WRIT OF MANDAMUS

TO THE HONORABLE
SUPREME COURT OF TEXAS:

Comes now REPRODUCTIVE SERVICES, INC., hereinafter called "Relator", complaining of the Honorable DEE BROWN WALKER, duly elected Judge of the 162nd Judicial District Court of Dallas County, Texas, hereinafter called "Respondent", and files this its Application and Petition for Writ of Mandamus, pursuant to Order of this Court on Relators' Motion for Leave to File Petition for Writ of Mandamus and states as follows in connection therewith.

I.

DESIGNATION OF PARTIES

Relator is one of the defendants in Case No. 78-4488-I, *Claudia Lott v. Reproductive Services, Inc., et al.*, now styled pending in the 162nd Judicial District Court of Dallas County, Texas.

Respondent occupies the office of State District Judge of the 162nd Judicial District Court of Dallas County, Texas, having been duly elected and sworn into office. Respondent entered the orders complained of herein.

II.

STATEMENT OF FACTS

On May 15, 1978, one Claudia Lott, a private citizen and former patient at the Relator's abortion clinic, filed a damage suit in the 162nd State District Court of Dallas County, Texas against Relator and another corporation, Reproductive Associates, P.A. (a professional association of physicians who perform abortions at Relator's clinic).

Plaintiff Lott alleges that she was an abortion patient at Relator's clinic in September, 1977 at which time a physician damaged her uterine artery during the abortion procedure and she allegedly sustained damages as a result of both the operation itself and the care and treatment she received while at Relator's clinic.

Plaintiff Lott pleades her suit as sounding in tort, but seeks primary relief under the *Texas Deceptive Trade Practice Act*, Tex. Bus. & Comm. Code Ann. § 17.41 *et seq.* (Vernon Supp. 1978) and other alleged violations of state medically-oriented statutes, and prays for a permanent injunction against Relator's operation.

Plaintiff Lott alleges that, for reasons none too clear in her Original Petition, the Relator is entering upon a unconscionable course of conduct in the manner in which Relator operates its clinic. Lott seeks to shut down Relator's clinic by way of permanent injunction, although she was discharged as a patient in September, 1977.

On June 19, 1978 the cause came on for trial upon the Petition of Claudia Lott for temporary injunction. Relator in open court moved to dismiss such petition upon the grouns that (1) the same stated no cause of action, in that Plaintiff Lott neither alleged nor was she faced with any imminent harm, (2) that not only did Plaintiff Lott fail to allege (as required for injunctive relief) lack of adequate remedy at law, she in fact alleged and prayed for a legal remedy by way of damages in the amount of $1,500,000, (3) that Plaintiff Lott alleged and complained of violations of provisions of rules and regulations of the Board of Medical Examiners, the Medical Practice Act, Psychologists' Licensing Act, Nurses' Practice Act, stating that she was entitled to enjoin such violations, but that there was no allegation of, nor in fact was there, any exhaustion of available administrative relief pursuant to the Administrative Procedure Act, (4) that Plaintiff Lott lacked legal capacity to enjoin operations of Defendant, (5) that the Deceptive Trade Practices Act, under which Plaintiff Lott seeks relief, does not apply to causes of action founded upon professional malpractice or negligent operation of businesses regulated by the State of Texas, and (6) that the trial court lacked jurisdiction for the mentioned reasons to proceed with a hearing upon the petition for temporary injunction. By order of June 19, 1978, the Respondent Judge overruled Relator's motion in all respects.

On June 16, 1979 Relator filed a motion in this Court for leave to file a petition for writ of mandamus, seeking to have the Court adjudge Respondent's order compelling disclosure of Relator's confidential records of patients' names, case and treatment void as unconstitutional. This Court directed counsel for Plaintiff Lott to reply within seven days of June 16. On that day, counsel for Plaintiff Lott informed Relator and the Respondent Judge that he would proceed to trial without the confidential records. As aforementioned, trial commenced on June 19. On June 21, at approximately 11:00 A.M., and during the trial, counsel for Plaintiff Lott asked a direct question on examination of Ms. Jerry McNeely, Relator's Dallas Clinic Director, evidence which is contained in the confidential records. Upon Relator's counsel's objection, counsel retired to the chambers of the Respondent Judge, where argument on the record was had. Respondent overruled all of Relator's objections, and ruled that Plaintiff Lott would in open court be permitted, beginning at 10:00 A.M. on June 22, 1978, to elicit the confidential information from Relator's clinic director.

While in chambers on June 21, 1978, Relator renewed its motion to dismiss Plaintiff Lott's claim for injunctive relief. Lott's counsel responded that she is seeking such injunction as class representative of a yet unspecified class of Plaintiffs although her pleadings stated no such course of action and in support of such position cited Respondent Judge to that portion of Plaintiff's Original Petition stating merely that Plaintiff sued on behalf of the public of Dallas County, Texas. Relator thereupon immediately moved the Respondent Judge to hold a hearing, as required by Texas Rules of Civil Procedure 42(c) to determine the viability to the asserted class action. Such motion was in all things overruled, and the

Respondent Judge proceeded to allow Plaintiff Lott to proceed as class representative as a justification of the admission of the evidence of treatment of other patients, including one patient whose confidential identity is still the subject of a pending Petition for Writ of Mandamus before this Honorable Court.

III.
STATEMENT OF JURISDICTION

The Supreme Court has jurisdiction over this proceeding under Tex. Const. Art V, Section 3 and the All Writs Act, Tex. Rev. Civ. Stat. Ann. art. 1733 (Vernon 1962). State v. Thurmond, 516 S.W. 2d 110 (Texas 1974); Pope v. Ferguson, 445 S.W. 2d 950 (Tex. 1969).

The Respondent Judge, by overruling Relators motions to dismiss, to hold a hearing upon viability as class action, and to suppress evidence upon contents of confidential patients' records, acted contrary to a mandatory duty imposed upon him by the rules of this Court, entered a void and unconstitutional order, and also committed acts constituting a clear abuse of judicial discretion. Such action will cause irreparable harm if not corrected by this Court, harm that cannot be remedied by way of appellate review.

IV.

QUESTIONS PRESENTED

Whether a state district judge must, before proceeding to trial upon the merits of an action claimed to be a class suit, hold a hearing to determine whether the same may be maintained as a class suit.

Whether an individual plaintiff is entitled to sue as class representative of "the citizens of a county" of this

State, without any allegations of common questions of law, fact, or numerosity.

Whether a state district judge may compel an employee of an abortion clinic to disclose information pertaining to the identity or treatment of a former non-party patient which is subject to such patients' claim of constitutional privilege where the purpose for which the evidence is offered is in support of a unpleaded class action upon which a class certification hearing has not been had.

Whether a private cause of action exists under the Deceptive Trade Practices Act, Tex. Bus. & Comm. Code Ann. § 17.41 *et seq.* (Vernon Supp. 1978) for medical professional malpractice or for negligence connected with the operation of any business or profession regulated by political subdivisions or state agencies pursuant to the laws of Texas.

* * *

Presently pending before this Court is Relators Motion for Leave to File Petition for Writ of Mandamus quashing Respondents order directing Relator to disclose privileged medical records to Plaintiff Lott. The serious constitutional implications inherent in the opening of constitutionally private lives of unrepresented third parties have been presented to the Court in connection with that Motion and will not be repeated here.

* * *

* * * Relator's business has been interrupted by television cameras, by reporters entering upon its business premises, and the privacy rights of those seeking Relator's services have been threatened. The possibility of a final order by the Respondent Judge closing Relator's business poses a threat to the viability and reputation of Relator's

business in Dallas and nationwide. It is obvious that Plaintiff Lott has employed tactics calculated to destroy Relator and to indirectly but significantly limit the opportunity to women in the Dallas area confidentially to exercise their constitutional right to elective abortions. The Respondent Judge's actions in refusing to hold a class certification hearing, in refusing to dismiss the Deceptive Trade Practices Act claim, and in forcing Relator to disclose matters subject to protection of the United States and Texas Constitutions are interlocutory matters from which no appeals can be taken, and refusal to abide by such orders would subject Relator, its counsel and employees to contempt of court. The threatened harm is imminent, permanent and the prospective damage therefrom is incalculable.

V.

PRAYER

Wherefore, Relator respectfully prays that Citation issue to Respondent; that this Petition be set for hearing; and that upon final hearing hereof, that a Writ of Mandamus issue ordering and commanding Respondent Dee Brown Walker to vacate and set aside his ruling on Relator's motion to dismiss, motion for hearing on viability of class suit, and objections to evidence relating to constitutionally protected information of unrepresented third parties; and for such other relief as is just and right.

Respectfully submitted,

OPPENHEIMER, ROSENBERG, KELLEHER & WHEATLEY, INC.

By: Seagal V. Wheatley

WYNNE & JAFFE

By: _____

B. Prater Monning, III

STATE OF TEXAS
COUNTY OF DALLAS

AFFIDAVIT OF RELATOR'S COUNSEL
SEAGAL V. WHEATLEY

On this 21st day of June 1978 at approximately 11;30 P.M., appeared before me, Seagal Wheatley who on his oath deposed and said:

I am Seagal V. Wheatley, attorney of record for Reproductive Services, Inc. Relator in this case and a co-defendant in the Cause No. 78-004488-I, Claudia E. Lott v. Reproductive Services, Inc. and Reproductive Associates, P.A., pending being tried before the judge of the 162nd District Court in Dallas County, the Honorable Dee Brown Walker presiding.

On Monday, June 19th, the Court began a non-jury hearing on Plaintiff's request for a temporary injunction against the defendants.

The facts set forth in the documents heretofore filed and contemporaneously filed with this affidavit are true and correct.

The immediate ruling complained of in the Petition for Writ of Mandamus and accompanying application for this Court to issue a temporary restraining order in aid of its jurisdiction occurred on Wednesday, June 21, 1978 at approximately 2:30 P.M. in the chambers of Judge Walker at which time the Judge overruled my objection to prevent the presentation of evidence relating to the care and treatment of former abortion patients at my clients' abortion clinic in Dallas.

Time does not permit me to obtain a copy of the record made of the in-chambers hearing, but I can and do state that the judge adversely and expressly overruled

my objection to the admission of such evidence and the court reporter was present at such time and was transcribing the proceedings.

The Judge ruled that commencing on Thursday, June 22, at approximately 10:00 A.M. - 10:30 A.M. when the trial begins again, that he intends to permit Plaintiff's counsel to proceed to examine witnesses, and in particular, my clients' Clinic Director, Jerry McNeely, to elicit testimony covering the clinics' care and treatment of other abortion patients.

Unless the Supreme Court can act with all emergency dispatch, this evidence will be elicited and irreparable harm will occur to Relator and Relators' former patients due to the imminent risk of disclosure of these patients' cases.

In fact, in the court hearing on Wednesday, June 21, Plaintiff's counsel G. H. Kelsoe, Jr., Esquire, directly asked Witness McNeely about the care of a former patient [name omitted], and named the abortion patient in open court and thus identified one such former patient. Such event gave rise to the in-chambers hearing referred to above. The news media was, and has been present in the courtroom during the trial, including television cameras shooting film of proceedings inside the courtroom from a glass door leading into the courtroom.

Thus, the name of patient has already been intentionally identified by Plaintiff's counsel, even though the Court and Plaintiff's counsel knew that Relator had pending since last Friday, June 16, a petition for a writ of mandamus seeking to protect the identity of former patients.

The name of this former patient has already been reported in the Dallas newspapers and the harm has been

done as to that woman who had a constitutionally protected right of privacy to have an abortion, free of identity from public disclosure.

The risk of such further occurrences is only enhanced without protection from this court and once public disclosure is made, the harm will be permanent.

Some of the patients whose care and treatment the judge has ordered to be disclosed may have had gonorrhea, been unwed and now married, or simply desire to exercise their right of privacy.

Our clinic director received a threatening phone call from a former patient today after this trial was highly publicized in the Dallas newspapers and television stations and threatened to sue the clinic if her name was revealed.

Either today, or yesterday, the clinic had 20 abortions scheduled and only 8 women kept their appointments.

The urgency and imminence of this matter cannot be overstated.

If the court's latest ruling permitting evidence of other cases at the clinic to be admitted and put in evidence is not restrained, then any claim Relator may later make as to the error in this ruling is moot and the consequences devastating.

Both the judge and Plaintiff's counsel, Mr. Kelsoe, have been served with Relator's pending Petition on the same subject matter, and now the Court has entered a void order permitting the same result under the justification that Plaintiff has alleged a class action, which point is briefed and argued in the accompanying documents.

/s/ _____
Seagal Wheatley

Subscribed and sworn to before me this 21st day of June, 1978.

/s/ [Illegible]
Notary Public

No. B-7680

IN THE
SUPREME COURT OF TEXAS

REPRODUCTIVE SERVICES, INC.,
Relator,

v.

DEE BROWN WALKER
DISTRICT JUDGE OF THE
162ND JUDICIAL DISTRICT COURT
OF DALLAS COUNTY, TEXAS,
Respondent.

PETITION FOR WRIT OF MANDAMUS

TO THE HONORABLE
SUPREME COURT OF TEXAS:

Comes now REPRODUCTIVE SERVICES, INC., hereinafter called "Relator," complaining of the Honorable DEE BROWN WALKER, duly elected Judge of the 162nd Judicial District Court of Dallas County, Texas, hereinafter called "Respondent," and files this its Application and Petition for Writ of Mandamus, pursuant to Order of this Court on Relators' Motion for Leave to File Petition for Writ of Mandamus and states as follows in connection therewith.

I.

Relator is one of the defendants in Cause No. 78-4488-I, styled "Claudia E. Lott v. Reproductive Services, Inc., et al." now pending in the 162nd Judicial District Court of Dallas County, Texas. By Court Order of June 15, 1978 entered by the Honorable Dee Brown Walker, State District Judge, Respondent, Relator, a non-profit Texas corporation operating an abortion clinic, was ordered to produce under Tex. R. Civ. Pro. 167 the medical records of six named patients, the medical records of any person suffering complications from procedures performed by Relator within the last twelve (12) months, and all patients receiving certain medications within the last twelve (12) months. [See Exhibit I to this Petition which is attached hereto and incorporated herein by this reference that is the June 15, 1978 Order complained of compelling the production of such records.]

II.

Respondent occupies the Office of State District Judge of the 162nd Judicial District Court of Dallas County, Texas, having been duly elected and sworn into office. Respondent signed, entered and filed the Order of June 15, 1978 in Cause No. 78-4488-I, pending in the Respondent's Court.

III.

Respondent, in entering the above-described and unprecedented Order on June 15, 1978, has entered a void and unconstitutional order and has also committed a clear abuse of judicial discretion by requiring production of privileged documents in direct violation of Tex. R. Civ. Pro. 167, the Fourteenth Amendment to the

United States Constitution, and Texas common-law principles of right of privacy.

STATEMENT OF JURISDICTION

The Supreme Court has jurisdiction over this Proceeding under TEX. CONST. art. V, Section 3, and TEX. REV. CIV. STAT. ANN. art. 1733 (Vernon 1962). *State v. Thurmond*, 516 S.W.2d 119 (Tex. 1974); *Pope v. Ferguson*, 445 S.W.2d 950 (Tex. 1969).

QUESTION

Whether a State District Judge's order compelling an abortion clinic to disclose records of patients' names and their care and treatment to a third party private litigant is an invasion of the right of privacy of either the clinic or the patient so as to prevent such disclosure.

FACTS

On May 15, 1978, one Claudia Lott, a private citizen and former patient at the Relator's abortion clinic, filed a damage suit in the 162nd State District Court of Dallas County, Texas against Relator and another corporation, Reproductive Associates, P.A. (a professional association of physicians who perform abortions at Relator's clinic).

Lott alleges that she was an abortion patient at Relator's clinic in September, 1977 at which time a physician damaged her uterine artery during the abortion procedure and she allegedly sustained damages as a result of both the operation itself and the care and treatment she received while at Relator's clinic.

Lott pleads her suit as sounding in tort, but seeks primary relief under the *Texas Deceptive Trade Practice Act*, Tex. Bus. & Comm. Code Ann. § 17.41 et seq., and other alleged violations of state medically-oriented

statutes, and prays for a permanent injunction against Relator's operation.[1]

Lott alleges that, for reasons none too clear in her Original Petition, the Relator is entering upon an unconscionable course of conduct in the manner in which Relator operates its clinic. Lott seeks to shut down Relator's clinic by way of a permanent injunction, although she was discharged as a patient in September, 1977.

Pursuant to her allegations, Lott seeks to subpoena medical records of other abortion patients from the Relator's clinic. On June 1, 1978, the District Clerk's office, at Lott's request, issued a subpoena duces tecum commanding Relator to produce records concerning the care and treatment of six named individuals, one of whom was Lott, and commanding Relator to also produce records concerning all persons who have, to the knowledge of Relator, suffered complications or received medications in connection with abortions over the last twenty-four (24) months.[2]

The Respondent Judge, upon filing of the suit on May 15, 1978, entered an *ex parte* show cause order against Relator, requiring Relator to appear and show cause why a temporary injunction should not issue enjoining the operation of Relator's clinic.

On June 12, 1978, Relator appeared in Respondent's court for the show cause hearing, at which time Relator

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[1] Relator can find no authority to support the proposition that Lott can maintain such a suit under the *Deceptive Trade Practice Act.*

[2] The Judge's Order compelling the production of such records reduced the period involved to twelve (12) months. See Order attached as Exhibit I.

presented its motion to quash the subpoena duces tecum that forms the basis of this mandamus proceeding.

In opposing the subpoena, Relator contended strenuously, *inter alia*, that the files of the patients who may have requested abortions are confidential and that disclosure of the files by Relator would not only violate the patients' constitutional and common-law right of privacy but would also require Relator to violate such rights of the Relator and the patients. Relator also contended that Plaintiff Lott made a wholly insufficient showing of relevancy and materiality.

Respondent Judge verbally overruled Relator's motion to quash the subpoena on the hearing on same on June 12, 1978 and entered a written Order on June 15, 1978 from which this application is taken, such written order requiring the production of such confidential and privileged patient records.

INADEQUATE REMEDY AT LAW

The Order of June 15, 1978 of the Respondent is an Interlocutory Order from which no appeal can be taken. To refuse to obey Respondent's Order would place Relator in contempt of court. The release of the requested information regarding Relator's patients would constitute an unprecedented violation of their rights and Relator's rights under the Fourteenth Amendment to the Constitution of the United States and the common law of privacy as well as Relator's right of privacy as against the demand of Plaintiff to produce such records. Relator would show the Court that it is necessary that a Writ of Mandamus issue against Respondent since the Respondent's Order is not only void because of its unconstitutionality but is also a clear abuse of discretion.

PRAYER

WHEREFORE, PREMISES CONSIDERED, Relators respectfully pray that Citation issue to Respondent; that this Petition for Writ of Mandamus be set down for hearing; and that upon final hearing thereof, a Writ of Mandamus issue ordering and commanding Respondent Dee Brown Walker, Judge of the 162nd Judicial District Court, Dallas County, Texas, to vacate and set aside his Order dated June 15, 1978 and to enter a new Order that in no manner requires Relator to disclose the identity of any patients, or medication and drugs received by such patients, or any other information that would disclose or lead to disclosure of the patients' identity, and for such other order to which Relator may be entitled.

Respectfully submitted,

OPPENHEIMER, ROSENBERG,
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By /s/ Seagal V. Wheatley

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By /s/ George Kolb

Attorneys for Relator,
Reproductive Services, Inc.

[1] No. 78-4488-I

Claudia E. Lott,
Plaintiff,

v.

In the District Court of
Dallas County, Texas
162nd Judicial District

Reproductive Services, Inc.
and Reproductive Associates,
P.A.
Defendants.

STATEMENT OF FACTS

[APPEARANCES DELETED]

ON THE 8th day of June, 1978, the above entitled and numbered cause came on for hearing before said Honorable Court, DEE BROWN WALKER, Judge Presiding, and the following proceedings were had:

[29] MR. WHEATLEY: . . . Out of over 70,000 abortions that have been conducted by my client, there has been only one death in five years and that occurred after Mrs. Lott was discharged as a patient from our clinic. If they contend that there have been others, we don't even know about them and that's the type of thing that is of a serious nature that we have got to get ready on because I have no records of that whatsoever, but yet they are using that as some type of thing to whip me over the head with to get you to go ahead with this hearing, and

I have no proof of that nor have I had an opportunity in the last three days that I have been in Dallas working on this case to find any evidence of that, but that is an extremely serious charge and I'm not prepared to defend that today. I will be in a week, I will be in ten days, but my records show totally to the contrary.

* * *

[4] MR. WHEATLEY: Is oppressive. Now we have filed or have prepared a motion to quash certain portions of that subpoena. You haven't had the benefit of seeing the subpoena but I can assure you that it is extremely broad.

Now if the Court wants to schedule a hearing which we have asked you for in our motion concerning the scope of that subpoena, then we would like to have that hearing.

MR. AYRES: We have no objection and we would like to hear it right now.

MR. KELSOE: Right now would be a good chance.

MR. AYRES: If he is sincere, I am sure that will be fine.

THE COURT: All right, go ahead.

MR. WHEATLEY: All right.

THE COURT: Have you got to be over yonder at 1:30 you say?

MR. KELSOE: Yes, sir.

[42] MR. AYRES: We are in good shape.

MR. KELSOE: We are all right, Your Honor.

MR. AYRES: Don't worry about us.

MR. KELSOE: We are all right, Judge.

THE COURT: I have got the court personnel here that hasn't had anything to eat or anything and nobody else has I don't suppose.

How long will this take?

MR. WHEATLEY: Probably half an hour.

May I approach the bench, Your Honor?

THE COURT: Yes, sir.

MR. WHEATLEY: I would like to if I may tender to Your Honor the subpoena.

THE COURT: Have it marked.

MR. WHEATLEY: All right.

(Instrument marked for identification purposes as Defendant's Exhibit No. 1 by the Court Reporter.)

MR. WHEATLEY: And I would like to if I may, Your Honor, file my motion to quash the subpoena at this time. There is the subpoena, Your Honor, and a copy of our motion to quash.

I think it may be helpful to Your Honor, that the Court could see what the law is for the court cases we have relied on in [43] connection with the motion to quash. * * *

[54] MR. WHEATLEY: Where we left off this morning. As the Court will recall the Plaintiffs subpoenaed the records of six named patients.

THE COURT: Yeah.

MR. WHEATLEY: And until we get some ruling on the confidential nature of these records, it would be inappropriate for me to disclose whether we have records on those patients that are named.

THE COURT: I'll rule that you have to disclose it. I'll rule that you have to disclose it. It is not privileged.

MR. WHEATLEY: The names of the patients?

THE COURT: Well, the names are on the subpoena whether you have the files or not.

MR. WHEATLEY: Well, may I present some argument to the Court on that?

THE COURT: You did this morning.

MR. WHEATLEY: We have done further research, Your Honor, in connection with that. I appreciate the Court's ruling but it is a matter which is of a rather fundamental interest to us and I would like for you to at least have the benefit [55] of all of the law as we see it before you rule.

THE COURT: All right.

MR. WHEATLEY: In September of '74 the Attorney General of Texas rendered an opinion, Opinion Number H-390, concerning the discoverability of County Hospital Medical Records under the Open Record Act and in connection with that opinion had some rather salient remarks concerning the current status of the law in Texas as applied to the particular type of relationship you have here; for example, it's not the typical business records or medical records type of case, but if I may explain to you the uniqueness of this matter. The client that we represent, the clinic, makes reports to the State Department of Health in connection with these cases, not only in connection with the abortions themselves but in connection with tests for gonorrhea which are reported pursuant to State statute. * * *

[57] Now what we have is the fact that our clinic contrary to really what the Plaintiffs contend is operating and is approved and has been approved by the Texas Health Facility and Commission in a public hearing which all of this relationship was disclosed several years ago, but we do report to these state agencies whose records are made confidential by statutes, not only in our hands but in the hands of the State of Texas.

Now this is not as you can tell quite what the cases in Texas talk about on common law and statutory law and other areas of discoverability of privilege but these are expressly protected by the statutes. They even go so far as to exempt as the Attorney General says information concerning legitimacy, parentage and adoption are excepted and protected by disclosure under Article 4477 which of course is directly related to the type of information we have, but then the Attorney General goes further and cites not only the Texas [58] statutes but the United States Constitution under the Fourteenth Amendment in protecting the confidentiality of abortion records per se, and they cited in the case decided by Justice Douglas in a [concurring] opinion, you remember the Roe vs. Wade case went up to the Supreme Court, and there was a companion case entitled Doe vs. Bolton in which Justice Douglas quotes to the confidential nature, absolute confidential nature which he said rose to the level almost to the priest and his parentage confidentiality concerning a woman's right to make a decision to have an abortion, and the significance of that case was that in Georgia, when Georgia legislature was going to permit abortion, they did not want all of the ladies to have an absolutely private decision with her physician on whether she ought to have one. The State Legislature wanted to require that the lady get another opinion from a doctor who would be on a State regulated type of set-up and the Court struck down the requirement and Justice Douglas in commenting even on another doctor looking at this doctor-patient relationship that that lady had an absolutely private decision to make on her right to have an abortion and that the State of Georgia could [59] not even require a doctor, another doctor under limited circumstances to determine if she really needed one or not, but the Attorney General Hill in his opinion does point out the right

in this country under the Fourteenth Amendment and under these statutes of the extreme privacy of a woman's right to a decision to have an abortion, and I think is what we are talking about here and this is why I feel like and there is no question in my mind that these records are privileged not only under the Fourteenth Amendment of the United States Constitution but by virtue of the statutes which require us to report these women's names and other statistics to the State agency because clearly the statute says that they are not discoverable.

* * *

[61] THE COURT: The thing is [*sic*]. Then I'll rule that you have to produce them and I'll give you an exception to it and go and file a mandamus against me. That's the only way I know to get it up in a hurry.

* * *

[88] THE COURT: Well, I understand you want what you subpoenaed but you subpoenaed everything in the house.

MR. AYRES: I tried to.

THE COURT: I mean you have got to be reasonable about these fool things. I mean good night.

* * *

APPENDIX C

TEXT OF STATUTES

TEXAS MEDICAL LIABILITY AND INSURANCE IMPROVEMENT ACT, Texas Public Health Code Ann., art. 4590i *et seq.* (Supp. 1977)

Article 4590i. Medical Liability and Insurance Improvement Act.

SUBCHAPTER A. GENERAL PROVISIONS

Definitions

Sec. 1.03. (a) In this part:***

(2) "Health care" means any act or treatment performed or furnished, or which should have been performed or furnished by any health care provider for, to, or on behalf of a patient during the patient's medical care, treatment, or confinement.

(3) "Health care provider" means any person, partnership, professional association, corporation, facility, or institution dully licensed or chartered by the State of Texas to provide health care as a registered nurse, hospital, dentist, podiatrist, pharmacist, or nursing home, or an officer, employee, or agent thereof acting in the course and scope of his employment.

(4) "Health care liability claim" means a cause of action against a health care provider or physician for treatment, lack of treatment, or other claimed departure from accepted standards of medical care or health care or safety which proximately results in injury to or death of the patient, whether the patient's claim or cause of actions sounds in tort or contract.***

(6) "Medical care" means any act defined as practicing medicine in Article 4510, Revised Civil Statutes of Texas, 1925, as amended, performed, or furnished, or which should have been performed, by one licensed to practice medicine in Texas for, to, or on behalf of a patient during the patient's care, treatment, or confinement. ***

SUBCHAPTER B. ADDITIONAL DISCIPLINARY POWERS

Definitions

Sec. 2.01. In this subchapter:

(1) "Board" means the Texas State Board of Medical Examiners.***

Confidentiality

Sec. 2.06. (a) Reports, information, or records received and maintained by the board pursuant to this subchapter, including any material received or developed by the board during an investigation or hearing shall be strictly confidential and subject to the provisions of Subsection (c) of this section; however, the board may only dislcose this confidential information:

(1) in a disciplinary hearing before the board or in a subsequent trial or appeal of a board action or order;

(2) to the physician licensing or disciplinary authorities of other jurisdictions, to a local, state, or national professional medical society, or to a medical peer review committee located inside or outside this state that is concerned with granting, limiting, or denying a physician hospital privileges;

(3) pursuant to an order of a court of competent jurisdiction; or

(4) to qualified personnel for bona fide research or educational purposes, if personally identifiable information relating to any person or physician is first deleted.

(b) Orders of the board relating to disciplinary action against a physician shall not be confidential.

(c) In no event shall records and reports received, maintained, or developed by the board, or disclosed by the board to others, pursuant to this article, be available for discovery or court subpoena, or introduced into evidence in a medical professional liability suit or other action for damages arising out of the provision or failure to provide medical or health care services.

(d) A person found guilty of an unlawful disclosure of this confidential information possessed by the board shall be guilty of a Class A misdemeanor.***

SUBCHAPTER D. NOTICE

Notice

Sec. 4.01 (a) Any person or his authorized agent asserting a health care liability claim shall give written notice of such claim by certified mail, return receipt requested, to each physician or health care provider against whom such claim is being made at least 60 days before the filing of a suit in any court of this state based upon a health care liability claim.***

(d) All parties shall be entitled to obtain complete and unaltered copies of the claimant's medical records from any other party within 10 days from the date of receipt of a medical authorization executed by the claimant herein shall be considered compliance by the claimant with this section.***

SUBCHAPTER F. INFORMED CONSENT

Definition

Sec. 6.01. In this subchapter, "panel" means the Texas Medical Disclosure Panel.

Theory of recovery

Sec. 6.02. In a suit against a physician or health care provider involving a health care liability claim that is based on the failure of the physician or health care provider to disclose or adequately to disclose the risks or hazards involved in the medical care or surgical procedure rendered by the physician or health care provider; the only theory on which recovery may be obtained is that of negligence in failing to disclose the risks or hazards that could have influenced a reasonable person in making a decision to give or withhold consent.

Texas Medical Disclosure Panel

Sec. 6.03. (a) The Texas Medical Disclosure Panel is created to determine which risks and hazards related to medical care and surgical procedures must be disclosed by health care providers or physicians to their patients or persons authorized to consent for their patients and to establish the general form and substance of such disclosure.***

Duties of Panel

Sec. 6.04. (a) To the extent feasible, the panel shall identify and make a thorough examination of all medical treatments and surgical procedures in which physicians and health care providers may be involved in order to determine which of those treatments and procedures do and do not require disclosure, shall establish the degree of disclosure required and the form in which disclosure will be made.***

Duty of physician or health care provider

Sec. 6.05. Before a patient or a person authorized to consent for a patient gives consent to any medical care or surgical procedure that appears on the panel's list requiring disclosure, the physician or health care provider

shall disclose to the patient, or person authorized to consent for the patient, the risks and hazards involved in that kind of care or procedure. A physician or health care provider shall be considered to have complied with the requirements of this section if disclosure is made as provided in Section 6.06 of this subchapter.

Manner of disclosure

Sec. 6.06. Consent to medical care that appears on the panel's list requiring disclosure shall be considered effective under this subchapter if it is giving in writing, signed by the patient or a person authorized to give the consent and by a competent witness, and if the written consent specifically states the risks and hazards that are involved in the medical care or surgical procedure in the form and to the degree required by the panel under Section 6.04 of this subchapter.

Effect of disclosure

Sec. 6.07. (a) In a suit against a physician or health care provider involving a health care liability claim that is based on the negligent failure of the physician or health care provider to disclose or adequately to disclose the risks and hazards involved in the medical care or surgical procedure rendered by the physician or health care provider:

(1) both disclosure made as provided in Section 6.05 of this subchapter and failure to disclose based on inclusion of any medical care or surgical procedure on the panel's list for which disclosure is not required shall be admissible in evidence and shall create a rebuttable presumption that the requirements of Sections 6.05 and 6.06 of this subchapter have been complied with and this presumption shall be included in the charge to the jury . . . .***

SUBCHAPTER K. LIABILITY LIMITS***

Limit on civil liability

Sec. 11.02. (a) In an action on a health care liability claim where final judgment is rendered against a physician or health care provider, the limit of civil liability for damages of the physician or health care provider shall be limited to an amount not to exceed $500,000.

(b) Subsection (a) of this section does not apply to the amount of damages awarded on a health care liability claim for the expenses, necessary medical, hospital, and custodial care received before judgment or required in the future for treatment of the injury.***

SUBCHAPTER L. MISCELLANEOUS PROVISIONS

Exception for certain laws

Sec. 12.01. (a) Notwithstanding any other law, no provisions of Sections 17.41-17.63, Business & Commerce Code, shall apply to physicians or health care providers as defined in Section 1.03(3) of this Act, with respect to claims for damages for personal injury or death resulting, or alleged to have resulted, from negligence on the part of any physician or health care provider.

(b) This section shall not apply to pharmacists. Acts 1977, 65th Leg. p. 2039. ch. 817, Part 1, eff. Aug. 29, 1977.***

TEXAS DECEPTIVE TRADE PRACTICES – CONSUMER PROTECTION ACT, Texas Bus. & Comm. Code Ann. § 17.41 *et seq.* (Supp. 1977)

SUBCHAPTER E. DECEPTIVE TRADE PRACTICES AND CONSUMER PROTECTION.***

§ 17.42. Waivers: Public Policy

Any waiver by a consumer of the provisions of this subchapter is contrary to public policy and is unenforceable and void.

§ 17.43. Cumulative Remedies

The provisions of this subchapter are not exclusive. The remedies provided in this subchapter are in addition to any other procedures or remedies provided for in any other law. The provisions of this subchapter do not in any way preclude other political subdivisions of this state from dealing with deceptive trade practices.***

§ 17.44. Construction and Application

This subchapter shall be liberally construed and applied to promote its underlying purposes, which are to protect consumers against false, misleading, and deceptive business practices, unconscionable actions, and breaches of warranty and to provide efficient and economical procedures to secure such protection.***

§ 17.46. Deceptive Trade Practices Unlawful

(a) False, misleading, or deceptive acts or practices in the conduct of any trade or commerce are hereby declared unlawful.

(b) The term "false, misleading, or deceptive acts or practices" includes, but is not limited to, the following acts:

(1) passing off goods and services as those of another;

(2) causing confusion or misunderstanding as to of another; sponsorship, approval, or certification of goods or services;

(3) causing confusion or misunderstanding as to affiliation, connection, or association with, or certification by, another;

(4) using deceptive representations or designations of geographic origin in connection with goods or services;

(5) representing that goods or services have sponsorship, approval, characteristics, ingredients, uses, benefits,

(6) representing that goods are original or new if they are deteriorated, reconditions, reclaimed, used, or secondhand;

(7) representing that goods or services are of a particular standard, quality, or grade, or that goods are of a particular style or model, if they are of another;

(8) disparaging the goods, services, or business of another by false or misleading representation of facts;

(9) advertising goods or services with intent not to sell them as advertised;

(10) advertising goods or services with intent not to supply a reasonably expectable public demand, unless the advertisements disclosed a limitation of quantity;

(11) making false or misleading statements of fact concerning the reasons for, existence of, or amount of price reductions;

(12) representing that an agreement confers or involves rights, remedies, or obligations which it does not have or involve, or which are prohibited by law;

(13) knowlingly making false or misleading statements of fact concerning the need for parts, replacement, or repair service;

(14) misrepresenting the authority of a salesman, representative or agent to negotiate the final terms of a consumer transaction;

(15) basing a charge for the repair of any item in whole or in part on a guaranty or warranty instead of on the value of the actual repairs made or work to be performed on the item without stating separately the charges for the work and the charge for the warranty or guaranty, if any;

(16) disconnecting, turning back, or resetting the odometer of any motor vehicle so as to reduce the number of miles indicated on the odometer gauge;

(17) advertising of any sale by fraudulently representing that a person is going out of business . . . .***

§ 17.50. Relief for Consumers

(a) A consumer may maintain an action if he has been adversely affected by any of the following:

(1) the use or employment by any person of an act or practice declared to be unlawful by Section 17.46 of this subchapter;

(2) breach of an express or implied warranty;

(3) any unconscionable action or course of action by any person; or

(4) the use or employement by any person of an act or practice in violation of Article 21.21, Texas Insurance Code, as amended, or rules or regulations issued by the State Board of Insurance under Article 21.21, Texas Insurance Code, as amended.

(b) In a suit filed under this section, each consumer who prevails may obtain:

(1) three times the amount of actual damages plus court costs and attorney's fees reasonable in relation to the amount of work expended;

(2) an order enjoining such acts or failure to act;

(3) orders necessary to restore to any party to the suit any money or property, real or personal, which may have been acquired in violation of this subchapter; and

(4) any other relief which the court deems proper, including the appointment of a receiver or the revocation of a license or certificate authorizing a person to engage in business in this state if the judgment has not been satisfied within three months of the date of the final judgment. The court may not revoke or suspend a license to do business in this state or appoint a receiver to take over the affairs of a person who has failed to satisfy a judgment if the person is a licensee of or regulated by a state agency which has statutory authority to revoke or suspend a license or to appoint a receiver or trustees.

(c) On a finding by the court that an action under this section was groundless and brought in bad faith or for the purpose of harassment the court may award to the defendant reasonable attorneys' fees in relation to the amount of work expended, and court costs.***

Amended by Acts 1977, 65th Leg., p. 603, ch. 216, § 5, eff. May 23, 1977.

§ 17.50A. Damages: Defenses

In an action brought under Section 17.50 of this subchapter, actual damages only and attorneys' fees reasonable in relation to the amount of work expended and court costs may be awarded where the defendant:

(1) proves that the action complained of resulted from a bona fide error notwithstanding the use of reasonable procedures adopted to avoid the error; or

(2) proves that he had no written notice of the consumer's complaint before the suit was filed, or that within 30 days after he has given written notice he tendered to the consumer (a) the cash value of the consideration received from the consumer or the cash value of the benefit promised, whichever is greater, and (b) the expenses, including attorneys' fees, if any, reasonably incurred by the consumer in asserting his claim against the defendant; or

(3) in the case of a suit under Section 17.50(a) (2) the defendant proves that he was not given a reasonable opportunity to cure the defects or malfunctions before suit was filed.

Added by Acts 1977, 65th Leg., p. 604, ch. 216, § 6, eff. May 23, 1977.***

§ 17.63. Application

The provisions of this subchapter apply only to acts or practices occurring after the effective date of this subchapter, except a right of action or power granted to the attorney general under Chapter 10, Title 79, Revised Civil Statutes of Texas, 1925, as amended, prior to the effective date of this subchapter.

Supreme Court, U. S.
FILED
DEC 1 1978
MICHAEL RODAK, JR., CLERK

In the

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-719

REPRODUCTIVE SERVICES, INC. and
REPRODUCTIVE ASSOCIATES, P.A.,
Petitioners,

v.

HONORABLE DEE BROWN WALKER,
District Judge of the 162nd Judicial District Court
of Dallas County, Texas,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF TEXAS

BRIEF OF CLAUDIA E. LOTT ON BEHALF OF RESPONDENT IN OPPOSITION

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OPINIONS BELOW

The Orders of the District Court appear at pages 10a and 18a of the Appendix to the Petition. The Orders of the Supreme Court of Texas appear at pages 6a, 7a and 8a of the same Appendix. All such Orders are unreported.

JURISDICTION

Mrs. Lott respectfully submits that this court lacks jurisdiction to grant the relief requested by Petitioners pursuant

to 28 *U.S.C.*, 1257(3), or upon any other basis. In order to demonstrate the accuracy of this contention a brief review of the procedural context of this case is required. Mrs. Lott originally sued the Petitioners and sought a temporary injunction to prohibit numerous alleged violations of Texas laws regarding health regulations. Mrs. Lott caused to be issued a Subpoena Duces Tecum for the temporary injunction hearing in which the Petitioners were required to produce records of treatment of certain named individuals, including Mrs. Lott, who had suffered either death or serious complications as a result of the Petitioners' conduct.[1] (Pet. App. 27a). The Petitioners filed a Motion to Quash this Subpoena which was overruled on June 15, 1978 by the District Court. (Pet. App. 23a). While the temporary injunction hearing proceeded, the Petitioners sued out a Writ of Mandamus to the Supreme Court of Texas, docketed number B-7680 which was filed June 16, 1978. (Pet. App. 48a). Thereafter, the Petitioners sued out yet an additional Writ of Mandamus docketed number B-7694, which was filed June 21, 1978. (Pet. App. 37a). The following day, June 22, 1978, the Petitioners as Defendants agreed and stipulated to the entry of an agreed temporary injunction specifically prohibiting the acts complained of by the Plaintiff and the intervenor, State of Texas. The following day the Supreme Court of Texas denied leave to file a Petition for Writ of Mandamus in cause number B-7680 (Pet. App. 6a) and in cause number B-7694 (Pet. App. 7a). On July 10, 1978, Mr. Justice Brennan in chambers issued a stay as to the "Order" of the Supreme Court of Texas without specifying which or what Order was in fact to be stayed. Thereafter, on July 17, 1978, Mr. Justice Brennan dissolved his original Stay Order (Pet. App. 3a) in

[1]References to the body of the Petition will be designated "Pet." and references to the Appendix to the Petition will be designated "Pet. App."

a chambers opinion. On August 1, 1978, on motion of the Plaintiff and the State of Texas the trial judge entered an Order to produce documents for discovery pursuant to Rule 167, *T.R.C.P.* (Pet. App. 10a). Thereafter, on August 21, 1978, Mr. Justice Brennan again in chambers granted yet another stay pending the filing of Writ of Certiorari. Petitioners are before this Court complaining of the denial of the Motion to Quash the original Subpoena (Pet. p. 11) and of "the Order" [presumably the Order of August 2, 1978]. (Pet. p. 13). With this background the Petitioners assert that ". . . The federal questions are now squarely before this Court . . ." (Pet. p. 13).

Petitioners' position in this regard is indeed a curious one given the procedural and substantive context of this appeal. Petitioners' original contentions relating to the Subpoena during an evidentiary hearing were rendered completely moot by the Petitioners' agreement to the entry of the temporary injunction. Since both Motions for leave to file Petitions for Writs of Mandamus in the Supreme Court concerned the Subpoena and evidentiary hearing in progress and since the agreement of the Petitioners precluded the necessity for further evidentiary production in that hearing, the Supreme Court of Texas had ample non-federal grounds for denying their requested mandamus, the most logical being that a determination of the cause was unnecessary by reason of mootness. Petitioners seem to recognize that this circumstance standing alone may well be fatal to the relief they seek before this Court. See, *Staub v. Baxley*, 355 U.S. 313 (1958). (Pet. p. 13, note 10). There can be little doubt that the determination of the narrow issue presented by the Subpoena Duces Tecum is now legally and factually moot. It is, of course, axiomatic that this Court will not extend its jurisdiction to the determination of such issues. Procedurally, therefore, the

only remaining complaint of the Petitioners is the discovery Order of the trial court entered August 2, 1978 and indeed it is toward this Order that Petitioners advance most of their argument. Again, however, no Federal question is properly before this Court as to the discovery Order. Under Texas law, a discovery order is considered interlocutory and non-appealable. *Tally v. TEIA.* 129 Tex. 134, 102 S.W. 2d 180 (1937). This Court has consistently refused to review such interlocutory orders for obvious reasons, including the absence of full factual development to limit, define, sharpen and provide perspective on the issues presented and this Court's historical predisposition to avoid piecemeal review of litigation. *Cobbledick v. U.S.*, 309 U.S. 323 (1939). In addition, however, it should be noted that there has been no attempt by the Petitioners to resort to or let alone exhaust an available state remedy if their claims before this Court should be considered meritorious. Since Mr. Justice Brennan's original Stay Order stayed the judgment of the Supreme Court of Texas denying an application for Writ of Mandamus only in regard to a Subpoena Duces Tecum (an issue which was completely moot when the Supreme Court of Texas ruled) and since the discovery Order of the trial court had never been reviewed by the intermediate or high Court of Texas, it was incumbent upon the Petitioners notwithstanding the in-chambers opinion of Mr. Justice Brennan to seek to avail themselves of the state remedy for the abuses they claimed. There has been no attempt whatsoever by the Petitioners to seek review of the discovery Order which would have been available if their contentions were meritorious under the Texas All Writs Act or by additional Application for Writ of Mandamus as to the discovery Order itself.[2] Petitioners "respectfully peti-

[2] *E.g., Crane v. Tunks*, 160 Tex. 182, 328 S.W.2d 434 (1959). See, also, *Southern Bag & Burlap Co. v. Boyd*, 120 Tex. 418, 38 S.W.2d 565 (1931).

tion this Court for a Writ of Certiorari to review the Order and judgment of the Supreme Court of Texas denying review of an Order of the District Court of Dallas County . . . . ." (Pet. p. 1). This Court can grant no such relief. The Supreme Court of Texas has never been asked or given an opportunity to review the Order complained of nor has the Supreme Court of Texas "denied review" of the Order complained of. Under such circumstances the most rudimentary jurisdictional prerequisites for case and controversy or Federal question are absent.

QUESTIONS PRESENTED

I. Whether this Court has jurisdiction to grant the Petition for Writ of Certiorari to the Supreme Court of Texas under the facts and circumstances of this Court.

II. Whether the Petitioners have standing to assert claimed rights or privileges on behalf of their clients.

III. Whether the Petition presents a new, serious or important Federal question, a conflict of decision and/or whether the judgments of the Courts below were correct.

STATUTE OR REGULATION INVOLVED

There is no specific statute which requires interpretation to dispose of the Petition.

STATEMENT

The tenor of the Petitioners' argument is to the effect that they are presumptively entitled to the benefit of the doubt as to all aspects of all factual references made before this Court. Mrs. Lott and presumably the State encounter considerable difficulty in refuting the factual claims of the Petitioners such as those stated at pages 8, 9 and 10 of the Petition because the proof which would establish the

falsity of many such references has not as yet been adduced in the cause. It will suffice to say that there will be an evidentiary dispute as to numerous factual statements of the Petitioners, including but not limited to whether or not Reproductive Services, Inc. is in fact a lawfully operated "nonprofit Texas corporation", whether Reproductive Associates, P. A. is in fact a "professional corporation" at all, when and under what circumstances Reproductive Services and Reproductive Associates began business, how many women have died or suffered serious complications as a result of the combined conduct of the Petitioners, whether the Petitioners agreed to and carried out a plan whereby admittedly incompetent individuals would serve as "counselors" to the "client" and whether equally incompetent and unlicensed individuals would provide substantially all of the medical care given the patient other than the abortion procedure itself, which was performed by a physician. Apparently there will even be dispute as to what cause of action Mrs. Lott and/or the State can assert as against the Defendants. The State of Texas and the Plaintiff have sued the Petitioners for violation of the Texas Consumer Protection — Deceptive Trade Practices Act, Section 17.41, *et seq.* of the *Business and Commerce Code* of the State of Texas. Petitioners continually suggest they are not subject to regulation under that law by virtue of Article 4590(i), *V.A.T.S.* (Pet. p. 9, note 6). Petitioners omit to discuss that they do not qualify as a "health care provider" under Section 1.03(a) (3) of Article 4590(i), *V.A.T.S.* (Pet. App. 60a). Accordingly, the exemption granted by Section 12.01 of Article 4590(i) *V.A.T.S.* does not apply. (Pet. App. 65a). Mrs. Lott and the State have not sued the physicians who were involved in the case and as of this date no claim of negligence has been asserted. The Plaintiff and the State allege and will prove a conspiracy by the

Petitioners and numerous individuals to violate virtually every licensing law which regulates the delivery of health care services under Texas law. Mrs. Lott respectfully disagrees that considerations of the merits of her case and that of the State "are not relevant". (Pet. p. 10, note 7). A final and important consideration is that wherever possible the Petitioners before this Court seek to cast themselves in the role of an unfortunate victim of a totally arbitrary abuse of discretion by the trial judge and presumably by the entire Supreme Court of the State of Texas. For example, at page 4 of the Petition, after discussion of sections of the discovery Order, Petitioners state they they ". . . are not granted any reciprocal rights for rebuttal purposes . . ." Petitioners do not linger to inform the Court that they never requested any such rights nor objected to their omission in the trial court. Next the Petitioners state in a footnote at the same page that "there are no standards . . . established for ruling upon an application to inspect the original records . . ." Apparently the gravamen of the Petitioners' complaint in regard to standards is that the trial court failed to specifically cite and refer to those portions of the controlling case authority which would guide the trial court's decision as to whether or not to grant inspection of documents. The entire substance of the Petitioners' position before this Court is predicated upon the hypothetical supposition that the trial court will not properly and accurately follow the rules and pronouncements of this Court in discharging its judicial responsibilities which is a proposition which itself is sufficient to justify denial of the Petition. Petitioners complain as to many provisions of the Order which they say might permit unwary individuals to be interviewed, etc. The Petitioners have not at any time requested any protective order from the trial court as to such eventualities nor has the trial court

permitted access to any information for any persons to learn the names of any persons nor has the trial court ruled or set up, as of this date, a procedure as to how or under what circumstances discovery shall proceed. In short, the Petitioners have constructed nothing more than a hypothetical strawman.

ARGUMENT

I. This Court lacks jurisdiction to grant the Petition for Writ of Certiorari.

This argument has previously been made at pages 1 through 5, *supra.*

II. Petitioners lack standing to assert claimed rights or privileges on behalf of their clients.

Historically, this Court has required a clear showing by the party seeking review of the State court decision that enforcement of the challenged judgment would deprive it personally — not someone else — of some right arising under the Constitution or laws of the United States. *Liberty Warehouse Co. v. Burley Tobacco Growers Coop,* 276 U.S. 71 (1927). The federally protected right in question must be one of the party and not a third person. *Barrows v. Jackson,* 346 U.S. 249 (1953). In *Barrows* the only exception to this rule was enunciated as an instance in which "the reasons which underlie our rule . . . are outweighed by the need to protect . . . fundamental rights which would [otherwise] be denied." 346 U.S. 239, 257. More recently this Court has spoken to this question in *Singleton v. Wulff,* 428 U.S. 106 (1976). There, Mr. Justice Blackmun speaking for a plurality of the Court, enunciated two criteria to determine standing in *jus tertii* cases:

> "The first is the relationship of the litigant to the person whose right he seeks to assert . . . 428 U.S. 106. The other . . . is the ability of the third party to assert his own right . . . 428 U.S. 115, 116."

In the same case this Court rejected the contention that its decision conferred unilateral standing for a provider of services, 428 U.S. 120, preferring instead to view each case in regard to standing on an individual basis. The issue of standing in the pure constitutional sense of the term is one of the most sophisticated and complex concepts of the law. It is, thus, not an area into which less able scholars should proceed. Accordingly, it will suffice to say that by any objective consideration this case presents both historically and under *Singleton v. Wulff* a salutary example of the absence of standing on the part of the Petitioners. First and foremost, the Petitioners do not seek to protect the rights to privacy of its "clients". Objectively reduced to simple terms, the Petitioners seek to establish a federally created privilege to protect themselves. This consideration raises several additional grounds for denial of standing. Briefly stated, they are as follows: first, the Petitioners have a direct conflict of interest with the "client" whose privacy they supposedly protect. The adversity of interest is shown on the face of the record as indicated above and is elucidated by the positions of the parties before this Court. Plaintiff Lott, whose privacy the Defendants sought to protect initially, almost at the expense of her life, seeks recovery in her own right and on behalf of a class of persons who have admittedly been injured as the result of the Defendants' conduct. By wrapping themselves in the penumbra rights of its victims, the Petitioners insulate themselves from potential liability. It is interesting to note that the Petitioners, in a position of a classic conflict of interest, lamely assert that revelations in strictly controlled discovery proceedings to the State of Texas or representatives of Plaintiff's class would do violence to the privacy of the patient while the Petitioners' unabated concealment of such facts would not. Such contentions are best left for advanced schools of sophistry to defend. Second, Petitioners

lack a confidential relationship with those it seeks to represent. The only relationship the Petitioners have with their clients is that the client had the misfortune of selecting the Petitioners to supervise the abortion process. The evidence in this case from the physician who performed the procedure in question, showed that the doctor had virtually no contact with the patient whatsoever prior to physically performing the abortion, and had no contact with her thereafter, if possible The evidence before the trial court in this case established that the main contact which the "client" had with the Petitioners was through a series of incompetent and unlicensed individuals practicing the healing arts in virtually every instance without benefit of the most rudimentary training or certification. This case is substantially identical in terms of clinic operation to that of *Planned Parenthood v. Danforth*, 428 U.S. 52 (1976), and *Bellotti v. Baird*, 428 U.S. 132 (1976). In the *Danforth* case, Mr. Justice Stewart in his concurring opinion noted in footnote 2 at 428 U.S. 91, given such impersonal circumstances, it was "... unlikely that . . . [the patient] will obtain adequate counsel and support from the attending physician . . ." In short, virtually every case in which the Court has found an exceptional circumstance to justify standing to assert a third-party's rights, there has been the highest position of trust and confidence between the absent third person and the party asserting his rights. Such a relationship is conspicuous for its absence here. Finally, the Petitioners lack the proper adversary posture to effectively assert third-party rights. In virtually every major pronouncement of this Court the party having standing to assert third-party rights has itself vigorously and aggressively sought to vindicate the rights of the third party in a primary sense. Here, the Petitioners come forward not with a sword but with a shield. Petitioners' primary concern is to protect themselves from disclosure of misconduct which will lead to further liability in a purely

defensive posture. The supposed rights of the patient in the context of the Petitioners' position are pursued in a secondary and ancillary fashion as an afterthought. Such a circumstance does not assure the adequate representation of the absent third party nor the necessary clear adversity of interest which will sharply define the controversy. Indeed, this case presents a classic example of the absence of standing. Petitioners respond to this argument by stating that the rights of their patients must be protected by them or "not at all". (Pet. p. 10, note 8). Petitioners have never requested that the Court appoint an attorney or guardian ad litem to protect the rights of the Petitioners' patients nor have the Petitioners ever shown any interest in an impartial, disinterested third-party playing any role in that context.

III. The Petition fails to present a new, serious or important Federal question or a conflict of decision and the result in the Courts below was a correct one.

A. *There is no important Federal question presented nor any conflict in decision to justify granting the Petition.*

The Order in question when read as a whole discloses the deepfelt and fundamental concern of the trial court for the privacy of the individuals involved. In 1973, when this Court recognized the right of a woman to control her own destiny in regard to abortion in *Roe v. Wade*, 410 U.S. 113 (1973), the policy consideration which prompted this Court's action was a sound and humane one. No woman should be denied access to medical treatment to terminate an unwanted pregnancy until the interest of the state and the unborn fetus constitutionally predominate. The purpose and intended effect of *Roe v. Wade* was to recognize the thousands of young women across the United States, married or single, who find themselves pregnant with a child which they cannot or do not wish to carry to term. *Roe* teaches that abortion should not, cannot, and must not be relegated to the garret or the

unsavory circumstances from which it originated. Indeed, the very Hippocratic Oath referred to by the Petitioners in support of their claim to privacy condemns abortion because historically abortion performed by the incompetent or inept or in unsanitary conditions produces a predictable increase in maternal mortality and morbidity. Illustrative is *State of Connecticut v. Menillo*, 423 U.S. 9 (1975), where the Connecticut Supreme Court, relying on *Roe v. Wade* and *Doe v. Bolton*, 410 U.S. 179 (1973), had reversed a conviction of layman who performed a criminal abortion under Connecticut statute. In rejecting that interpretation and returning Mr. Menillo to his rightful place in the penitentiary, this Court, in a *per curiam* opinion, stated in part:

> ". . . the State's interest in maternal health is predicated upon the first trimester abortion being as safe for the woman as normal childbirth at term, and that predicate holds true only if the abortion is performed by medically competent personnel under circumstances insuring maximum safety for the woman . . ."

The Court went on to state:

> ". . . so far as this Court and the Federal Constitution are concerned, Connecticut statute remains fully effective against the performance of abortions by non-physicians . . ." 423 U.S. 8, 9.

Moreover, this Court in *Roe* expressly stated:

> "The State has a legitimate interest in seeing to it that abortion, like any other medical procedure is performed under circumstances that insure maximum safety for the patient. This interest obviously extends at least to the performing physician and his staff, to the facilities involved, to the availability of aftercare, and to adequate provision for any complication or emergency that might arise. The prevalence of high mortality rates at illegal 'abortion mills' strengthens, rather than weakens, the State's interest in regulating the conditions under which abortions are performed . . ." 410 U.S. 113 at 150.

It may be safely said that the entire body of law developed by this Court in regard to abortion has been designed primarily to protect the physical well-being of the patient and to minimize her difficulty in obtaining a constitutionally protected abortion. This Court has never countenanced the incompetent counselors or physicians demonstrated to operate the Petitioners' facilities and expressly rejected the idea that such persons may, under the guise of abortion, protect themselves from liability, criminal or civil, by wrapping themselves in the constitutionally protected rights of their victims. *State of Connecticut v. Menillo, supra.* Unless the State and injured persons are able to discover the misconduct of the Petitioners there can be no effective regulation of the predatory conduct demonstrated by the Petitioners and the incompetence demonstrated by their employees and physicians. If there can be no discovery of records which go to establish violation of law in a very high percentage of cases there can be no successful enforcement or prosecution under the law violated nor compensation for those injured. If the Petition for Certiorari is granted in this case as presenting an important Federal question which has not been clearly disposed of correctly by the Court below, this Court will have destroyed the humanitarian purpose that *Roe v. Wade* sought to create. In the process it will return abortion to its unseemly past.

B. *The Courts below have reached a correct result in this case.*

There should be no mistake as to the substance of the Petitioners' argument. Petitioners seek to create an absolute "testimonial privilege" for abortion patients under the guise of the right to privacy under the Fourteenth Amendment. (Pet. p. 14). Petitioners correctly note that Texas does not recognize at common law or by statute a privilege regarding

physician-patient communications. *Id.* Never has this Court sought to declare to the states the requirements or limits of an evidentiary privilege remotely approaching that advocated by the Petitioners. Traditionally, the states have been free to determine the standards and limits of evidentiary privileges as they may see fit. To bring this contention into sharp focus, if the contention advocated by the Petitioners is correct the finest hospitals and physicians in Texas that daily involve themselves in the most intimate aspects of a patient's life would have no evidentiary privilege to refuse to produce such records claiming a "right to privacy" on behalf of the patient, which is not recognized in Texas, while at the same time a so-called "free standing" abortion clinic would have such an absolute evidentiary privilege. The result to be sanctioned is even more curious in light of the fact that other than through the Deceptive Trade Practices Act and the licensing laws pertaining to medical professionals, Texas has no specific statute which regulates a free-standing abortion facility while it has numerous statutes which regulate hospitals and clinics. Since the Petitioners' clinic does not meet minimum requirements of State law to be classified as a hospital or clinic according to the Petitioners it cannot be regulated and its mistreatment of its patients cannot be discovered.

Finally, the specific objections of the Petitioners to the Order should be briefly noted. First, Petitioners complain that a number of patients are affected. Petitioners concede that a motion to certify a class of individuals is before the trial court and the State of Texas has intervened not only on behalf of the patients that have been injured in other clinics but in all other clinics in Texas as well. The trial court's Order requires the production of documents in which the patient claims to have had complications which are known in some instances to have resulted in death or serious

injury in the Defendants' Dallas facility and which have medical significance in a high percentage of cases when present. There is no contention that the production of these documents is impossible or oppressive; a substantial volume of them are available in a computer-assisted form; and in order to fairly evaluate and screen those injured and to confirm such other information such records are essential. Second, the Petition claims that production of records has "no relation to Mrs. Lott's case." The apparent defense in Mrs. Lott's case is that the acts complained of represented the negligence of only one physician and/or were an accident or honest mistake. The proof sought to be discovered by Mrs. Lott will establish so many such occurrences by other doctors as well as by Dr. Gardner that the jury will be justified in concluding this was not an isolated act of negligence but was part of a conspiracy between the named Defendants to violate the acts in question resulting in damages to Mrs. Lott and others. Of course, the State of Texas' interest is not limited to the City of Dallas but extends to the State as a whole as does that of the class to be represented in this catastrophe. Next Petitioners complain that the discovery Order does not permit the Petitioners discovery which they might desire to have. No such discovery has ever been requested by the Petitioners and it is available if it was requested.

Throughout the Petition it is claimed there are no fixed standards by which the trial court will judge how and under what circumstances the identities of patients will be released or protected. First and foremost, it would be impossible for any lower Court to summarize in a discovery Order the entire body of law which would bear upon whether the Plaintiff or the State have made the requisite showing of a compelling necessity for the production of documents in the hands of Petitioners. Neither the trial court nor the Supreme Court

of Texas has demonstrated any lack of judgment or knowledge as to the statutory and case authority which is involved in determination of discovery issues in this lawsuit. While a fertile imagination can conjure up thousands of hypothetical abuses which could occur in the final analysis, this Court cannot determine nor should it attempt to determine such a hypothetical circumstance. At this early stage in the litigation it would be premature and unwise for this Court to attempt to state or promulgate the law applicable to a civil discovery proceeding which has thus far been correctly and humanely decided by the Courts below. The final contention advanced by the Petitioners is that persons by virtue of discovery may be required to testify or reveal matters of a personal nature which such former patients or witnesses might prefer left unsaid or unanswered. No one can deny that in a hypothetical case under purely hypothetical facts that a hypothetical disruption may occur. The trial court has ample procedural and substantive devices to protect against and prevent all the hypothetical abuses imagined by the Petitioners. In addition, the trial court's decision and protective order, if this is the extraordinary case the Petitioners suggest, can be immediately reviewed for abuse by extraordinary means by the Supreme Court of Texas on an emergency basis. *Wallace v. Briggs*, 162 Tex. 485, 348 S.W. 2d 523 (1961); *Crane v. Tunks, supra*, and *Southern Bag & Burlap Co. v. Boyd, supra.* Moreover, the necessity for compulsory attendance and testimony of witnesses in civil and criminal cases is at the very heart of our adversary system of justice. The fact that a victim of a criminal offense may not wish to discuss the details of the crime or the identities of its perpetrators is no excuse or justification for requiring the State or those representing the innocent victim from doing their utmost to prosecute the guilty, prevent the reoccurrence of the offense, and to compensate for the injury to the fullest extent the law permits.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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Attorneys for Claudia E. Lott on behalf of Respondent.

78-719

APPENDICES

* * *

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1978

* * *

No. 1069

* * *

REPRODUCTIVE SERVICES, INC., and
REPRODUCTIVE ASSOCIATES, P.A.,
Petitioners

V.

HONORABLE DEE BROWN WALKER,
District Judge of the 162nd Judicial District Court
Of Dallas County, Texas,
Respondent.

* * *

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF TEXAS

* * *

BRIEF FOR RESPONDENT IN OPPOSITION

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APPENDIX A

NO. 78-4488-I

Claudia E. Lott	)	In The District Court
vs.	)	Of Dallas County, Texas
Reproductive Services, Inc. and Reproductive Associates, P. A.	)	162nd Judicial District

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EXCERPT OF PROCEEDINGS had In Chambers in the above numbered and entitled cause on the 22nd day of June, 1978, before THE HONORABLE DEE BROWN WALKER, Judge Presiding of the 162nd District Court of Dallas County, Texas, to-wit:

THE COURT: All right, we are now in chambers here in the presence of representatives of the Attorney General's office, Mr. Kelsoe, Mr. Ayres, Mr. Wheatley and Mr. Sayles. Okay.

MR. WHEATLEY: If it please the Court, Your

Honor, we have been presented a Petition of Intervention of State of Texas and also another document entitled Agreed Temporary Injunction which I am prepared to sign on behalf of my client, Reproductive Services, Inc., with the following understanding which I would like to have all counsel agree to on the record which will be as following:

I

That Items 1 through 20 so enumerated in the Agreed Temporary Injunction are not admissions by my client that any of the facts or conclusions recited in Paragraphs 1 through 20 have in fact occurred; and

II

That by the entry of the Agreed Temporary Injunction, my client will not be admitting that the actions have occurred, and that the Agreed Temporary Injunction will not be used as evidence that such acts have occurred in any proceeding in this cause; and

III

I understand from Mr. Kelsoe's announcement a moment ago that the Claudia Lott case as it relates to Claudia Lott won't proceed any further at this time, and of course, our client would fully cooperate with the Attorney General's investigation; and

IV

That any depositions taken in the cause would not be filed with the Clerk's office where they would be subject to public disclosure without motions being filed and due notice and hearing as to the disclosure of such depositions; and

V

That until the Texas Supreme Court rules on the pending Petitions for Writ of Mandamus, that my client would not be obligated to disclose the matters which we have complained of in the two Petitions for Writ of Mandamus.

THE COURT: Agreed, Mr. Flanary?

MR. SAYLES: On behalf of Reproductive Associates, P.A., I would ask for the same stipulation for executing the Agreed Order.

THE COURT: All right, how about it, Mr. Flanary, you agree?

MR. FLANARY: Judge, we will agree to the stipulation with this amendment to it: that I ask all counsel agree that no discovery will be had or taken in the case until the Supreme Court has ruled on the Writ of Mandamus now pending before it or on any other writs that may be filed by the Defendants in this case at a subsequent time; however, once a ruling has been had from the Supreme Court, discovery will be taken on all names of all patients of the Clinics throughout the State and all records on the nature of the conditions shown in those records would be discoverable by the State of Texas.

MR. WHEATLEY: That's agreeable to me if that's what the Supreme Court rules; in other words, we don't know whether they will put some limitation.

MR. FLANARY: Yes.

MR. WHEATLEY: We want to obviously comply with the Supreme Court's Order or any Federal Court's Order as to the nature and extent of any discovery.

MR. FLANARY: I want it clear once the Supreme Court of Texas has ruled and absent any intervention rulings the Supreme Court does allow the discovery of

those names that our stipulation is now not discovery that would be conducted by the State of Texas, that we would have access to all records, the nature of complaints, the nature of problems and the patients' names.

MR. WHEATLEY: With this one proviso: I would like to have a Court order at that time ordering me to disclose them so as to avoid any liability for invasion of privacy claims that patients may still wish to assert.

MR. FLANARY: I can't stipulate to that.

MR. WHEATLEY: In other words, I still don't want to voluntarily turn them over but I will if the Court orders me to do so, you see?

MR. FLANARY: As I understand it, we had an agreement that if the Supreme Court says that you have to, that the records are discoverable in effect.

THE COURT: There is already an Order because I have ordered them turned over, you see?

MR. WHEATLEY: You are right, okay.

THE COURT: You understand now, everybody understand?

MR. CHUMLEA: We are all in agreement in this.

MS. FRYE: Yes.

MR. KELSOE: Judge --

THE COURT: How about you, Kelsoe?

MR. KELSOE: We have not - we would want to have the same rights to discovery that the State has.

THE COURT: Well, you are going to have.

MR. KELSOE: Unless the Supreme Court restricts

in any fashion.

THE COURT: We have got to get the ruling on those cases that are down there, you see where they stand.

MR. KELSOE: In addition to that, Your Honor, we did file this morning a class framed petition asking we be allowed to proceed as a a class, and I want it understood that if we do agree to discontinue today, which I did say we would do, it is without prejudice to our rights to resume this proceeding should it become necessary to get discovery in conjunction with the State or separate from the State if it turns out that we seek additional discovery other than what the State wants.

MR. WHEATLEY: Well, I can't agree to that now.

THE COURT: That has nothing to do with the State's order.

MR. WHEATLEY: Not as I see it.

MR. AYRES: Here is what, Judge, is involved in the temporary injunction hearing right now. On our application, we filed a class action, and we think we are entitled to an injunction on it right now.

THE COURT: I am aware of all that. We have to get rid of the Supreme Court and let them decide, and I will go on with my lawsuit.

MR. KELSOE: As long as it is understood we are doing it without prejudice of the class.

THE COURT: Without prejudice to anybody.

On the trial of the case, on the damage suit case, I'm not going to permit this Agreed Temporary Injunction to be put before the jury. Does everybody understand?

MR. FLANARY: I think it goes without saying so and it is understood that subsequent to the entry of the

Agreed Temporary Injunction if there are violations found, that the State will and can and we certainly will seek contempt proceedings.

MR. WHEATLEY: And you would offer it in evidence.

MR. FLANARY: Offer it in evidence at that time in that contempt proceeding.

THE COURT: All right, that's something else.

APPENDIX B

IN THE SUPREME COURT OF TEXAS

.....

No. B-7680

.....

Reproductive Services, Inc.

v. Original Mandamus

Hon. Dee Brown Walker, Judge

[June 23, 1978]

Relator's motion for leave to file petition for writ of mandamus filed herein on June 16, 1978, having been duly considered, it is ordered that said motion for leave to file be, and hereby is, overruled.

It is further ordered that the Temporary Writ of Injunction issued by this Court on June 22, 1978 be, and hereby is, dissolved in the above numbered and entitled case.

It is further ordered that relator, Reproductive Services, Inc., pay all costs expended and incurred in this Court in this case.

.....

APPENDIX C

SUPREME COURT OF THE UNITED STATES

.....

No. A-1091

.....

Reproductive Services, Inc., Applicant,

v.

Dee Brown Walker, District Judge.

On Application to Stay an Order of the Supreme Court of Texas.

[July 17, 1978]

MR. JUSTICE BRENNAN.

I have before me an application[1] to stay an order of the Supreme Court of Texas, which denied applicant's motion for a writ of mandamus directed to respondent. The questions at issue here arise in a suit brought by Claudia E. Lott against applicant, which in essence charged applicant with medical malpractice in performing an abortion on Mrs. Lott. The complaint further charged applicant with violating the Texas Deceptive Trade Practices-Consumer Protection Act, Texas Bus. & Comm. Code Ann. §17.41 *et seq.* (Supp. 1977), in that applicant misrepresented the quality of care it was prepared to provide and failed to disclose material information regarding the risks involved in procedures used at applicant's abortion clinics. The State of Texas was allowed to intervene in this action

[1]This application was originally presented to Mr. Justice Powell, as Circuit Justice and, in his absence, was referred to Mr. Justice Rehnquist, who denied the application.

pursuant to the Deceptive Practices Act. Mrs. Lott and the State of Texas are the true parties in interest here.

Mrs. Lott caused a subpoena *duces tecum* to be issued against applicant. This subpoena sought the medical records of five named patients at applicant's clinics and also sought the medical records of any other patient who had any major or serious complications arising from an abortion at applicant's clinics or who had received certain medications. Applicant sought to quash this subpoena on the ground of invasion of its patients' privacy. This motion was granted in part by the respondent trial judge, who ruled that the records must be turned over, but that patient names could be deleted. Applicant sought mandamus in the Supreme Court of Texas to overturn this order. Subsequently counsel for applicant, Mrs. Lott, and the State of Texas entered a consent order and temporary injunction in which applicant agreed that on determination of applicant's petition for mandamus the State could take discovery "on all names of all patients of [applicant's] clinics throughout the State and all records on the nature of the conditions shown in those records."

The question sought to be raised by applicant—whether the names of abortion patients can be obtained by discovery for use in a civil suit against a person or clinic performing abortions where, as here, the parties have not agreed to a protective order to ensure the privacy of those patients—is a serious one. If this question were in fact presented by this case, I am of the view that four Members of this Court would vote to grant certiorari to hear it.[2] However, this issue is not presented here. First, the order of the trial court challenged by applicant's petition for mandamus did in

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[2]Applicant has styled his application as one for a stay pending petition for mandamus, but the appropriate avenue of relief would be by certiorari and I so read the papers.

fact provide that the names of applicant's patients could be deleted. Second, the State of Texas has represented in its response in this Court that it is prepared to enter into a protective order which will ensure the privacy of all patients at applicant's clinics. In light of the representations of the State of Texas, there is no irreparable injury to any patient's privacy interests which would justify a stay of the order of the Supreme Court of Texas.

Therefore, on express condition that the parties agree to a protective order ensuring the privacy of patients at applicant's clinics, the stay I entered on July 10, 1978, in these proceedings is hereby dissolved. If such a protective order is not entered, applicant may resubmit a further stay application.

. . . . . .

APPENDIX D

SUPREME COURT OF THE UNITED STATES

.....

No. A-1091

.....

Reproductive Services, Inc.,
Applicant,

v.

Dee Brown Walker, District Judge.

On Renewed Application to Stay an Order of the Supreme Court of Texas

[August 21, 1978]

MR. JUSTICE BRENNAN.

On July 17, 1978, in a chambers opinion, I stated that "on express condition that the parties agree to a protective order ensuring the privacy of patients at applicant's clinics, the stay I entered on July 10, 1978, in these proceedings is hereby dissolved. If such a protective order is not entered, applicant may resubmit a further stay application."

On August 14, 1978, applicant renewed its application, filing therewith a copy of an order entered August 1, 1978, by respondent, which they alleged did not constitute "such a protective order." Upon examination of said order of August 1, 1978, it is my view that said order does not constitute "such a protective order." Accordingly, the "express condition" upon which my stay entered on July 10, 1978, was to be dissolved not having been satisfied, said stay of July 10, 1978, is continued in effect pending the timely filing of a petition for certiorari.

Should said petition for writ of certiorari be denied, the stay of July 10, 1978, is to terminate automatically. In the event said petition for writ of certiorari is granted, the stay of July 10, 1978, is to continue in effect pending the issuance of the mandate of this Court.

. . . . . .

APPENDIX E

.....

NO. 78-4488-I

.....

Claudia E. Lott	In The District Court Of
v.	Dallas County, Texas
Reproductive Services, Inc. and Reproductive Associates, P.A.	162nd Judicial District

[APPEARANCES DELETED]

PROCEEDINGS had in open court in the above numbered and entitled cause beginning on the 19th day of June, A. D. 1978, before the HONORABLE DEE BROWN WALKER, Presiding Judge of the 162nd Judicial District Court of Dallas County, Texas, to wit:

PROCEEDINGS IN PART

MR. AYRES: All, right, sir, now Dr. Gardner, you have indicated in your testimony that what was being done at Reproductive Services, Inc. at least in part was an abortion procedure, is that right?

DR. GARDNER: Yes, sir.

MR. AYRES: What contact in the regular operation of business of Reproductive Services did you have with patients generally speaking?

DR. GARDNER: Occasionally I examined the patient prior to the time she was placed into the procedure room, but usually my first contact with the patient was on the procedure table when I did a bimanual examination and introduced myself.

MR. AYRES: So in the normal course of events of the operation of this facility, you as the physician first saw the patient in an ordinary case when she actually came in the treatment room to have the abortion performed, is that right?

DR. GARDNER: Yes, sir.

* * *

MR. AYRES: So for the Court's benefit, the sequence of events of Ms. Lott's case was that after she came into the examination room and you saw her, she was brought into the treatment room by the counselor and the counselor was actually present there and in charge of maintaining an antiseptic area there for you to operate or cleansing the area so that it would be antiseptic for you to operate on this patient, is that right?

DR. GARDNER: Yes.

MR. AYRES: And did this person have any license whatsoever to assist you as a nurse or as a physician's assistant or anything like that?

DR. GARDNER: Not that I know of.

* * *

MR. AYRES: All right, sir, frequently is it true that the recovery room is not attended by a nurse or a physician, but maybe attended by someone else?

DR. GARDNER: Frequently.

MR. AYRES: All right, sir, and in your experience, sir, is it frequently true that the individuals who attend the patients in the recovery room is not a person licensed to practice either medicine or nursing to the best of your knowledge?

DR. GARDNER: That's sometimes true.

MR. AYRES: All right, sir, now when you are talking about a recovery room, Doctor, remember that the Court has never seen the inside of that place or as it was at this time, could you describe to the Judge, please, sir, what the quote "recovery room" unquote, looks like?

DR. GARDNER: It's a large room approximately thirty feet long, twelve feet maybe wide, at that time there were four day beds, four beds in one end of the recovery room. There were two couches, I believe, two or three chairs.

MR. AYRES: These are the overstuffed lounge chair type things?

DR. GARDNER: Yes, sir.

MR. AYRES: Okay.

DR. GARDNER: Some end tables and lamps.

MR. AYRES: I think that probably answers my question. Basically, Doctor, then when you describe their recovery room, in the setting of Reproductive Services, it's nothing like what you would see in a hospital recovery room?

DR. GARDNER: No, sir.

MR. AYRES: All right, you have got four day beds and a couple of couches and end tables and basically it looks more like a den or I should say an inexpensive den or modest den in a residence, would that be right?

DR. GARDNER: Yes, sir.

MR. AYRES: All right, have carpet on the floor?

DR. GARDNER: Yes, sir.

MR. AYRES: No attempt to preserve an aseptic or antiseptic environment there?

DR. GARDNER: No, sir.

* * *

MR. AYRES: Do you know how far between times it was from one scheduled abortion to the next?

DR. GARDNER: No, sir.

MR. AYRES: Could you give us some idea?

DR. GARDNER: I really can't.

MR. AYRES: Well, tell me what the average length of time was from the time you finished one abortion until you took up another on an average day?

DR. GARDNER: If things were going very smoothly, a minute.

MR. AYRES: A minute?

DR. GARDNER: A minute and a half.

* * *

MR. AYRES: In addition to what else you have told us, you also had to rescrub, didn't you?

DR. GARDNER: No, sir, we don't scrub before these procedures. We use sterile gloves, but we don't scrub.

MR. AYRES: You don't wash your hands between these abortion procedures?

DR. GARDNER: Yes, sir.

MR. AYRES: You do not?

DR. GARDNER: We do not.

MR. AYRES: Do you know of any major medical facility in Dallas that permits perfomance of multiple

surgery without scrubbing between surgery whether sterile gloves are used or not?

DR. GARDNER: No, sir.

* * *

MR. AYRES: You mentioned a reaction, a systemic reaction to Xylocaine as a possible complication, that was one of the reasons that you had the emergency systems for, do you remember that?

DR. GARDNER: Yes, sir.

MR. AYRES: What is the most typical complication, life threatening complication of that sort of reaction?

I should restrict my question to cardiac function, I'm sorry, what sort of dysrhythmia or arhythmia does that frequently cause?

DR. GARDNER: It frequently causes slow down of the heart rate.

MR. AYRES: Bradycardia?

DR. GARDNER: Yes, sir.

MR. AYRES: All right, sir, and it also can cause dysrhythmia or arhythmia, can it not, in addition to bradycardia?

DR. GARDNER: Yes, sir.

MR. AYRES: All right, sir, now there is something missing here, isn't there, Doctor, to diagnose that condition, what is it?

DR. GARDNER: Electrocardiogram.

* * *

MR. AYRES: Right. You can determine if the pulse is too slow or it's too fast or if it is irregular or it's erratic, but you can't determine what is causing it, can you, unless you have an EKG so that you can look at the waves, right?

DR. GARDNER: That's true.

MR. AYRES: So what good is it to have these drugs unless you have a complete cardiac arrest in the patient, you couldn't give a patient calcium carbonate because you don't know if you want to stabilize the beat or that rhythm or not, do you?

DR. GARDNER: That's right.

MR. AYRES: You don't have a scope, do you?

DR. GARDNER: Not an electrocardiogram, no.

* * *

MR. AYRES: All right, sir, how would you diagnose PVC's in a patient having a systemic reaction to Zylocaine (sic) without an EKG?

DR. GARDNER: You really can't diagnose it.

MR. AYRES: Can't diagnose it, and if PVC's in a patient are untreated for a long enough period of time, what's going to happen?

DR. GARDNER: They can't fibrillate.

MR. AYRES: And when they fibrillate, what happens?

DR. GARDNER: Generally they may die or --

MR. AYRES: That's right, they do die, don't they?

DR. GARDNER: Sometimes.

MR. AYRES: Which brings me to my next question, what else is missing if you want to treat somebody for life threatening complications such as fibrillation, a defibrillator, did you have a defibrillator over there?

DR. GARDNER: No, sir.

MR. AYRES: So you couldn't diagnose anything except a complete cardiac arrest and you couldn't treat anything that had to do with ventricular fibrillation?

DR. GARDNER: Not unless you did external chest massage.

MR. AYRES: Yes, sir. An external chest massage is not going to help you one ounce with somebody in deep fib, is it?

DR. GARDNER: It may help you buy a little time.

MR. AYRES: Sixty seconds, a minute, until they arrest?

DR. GARDNER: Yeah.

* * *

MR. AYRES: In addition to the Xylocaine reaction which we discussed, another complication frequently associated with abortion is hemorrhage, is it not?

DR. GARDNER: Yes, sir.

MR. AYRES: What is the chief life threatening complication of hemorrhage in terms of physiological function?

DR. GARDNER: Hypovolemia.

* * *

MR. AYRES: Okay, that gives rise to a condition called hypovolemic shock, doesn't it.

DR. GARDNER: Yes, sir.

* * *

MR. AYRES: Now if hypovolemic shock continues untreated or worsens, what happens to the patient's heart?

DR. GARDNER: They get anoxic.

MR. AYRES: And again you can get dysrhythmia and arhythmia.

DR. GARDNER: Yes, sir.

MR. AYRES: Okay, how did you diagnose dysrhythmia and arhythmia in a patient with hypovolemic shock at Reproductive Services?

DR. GARDNER: By feeling the pulse.

MR. AYRES: Okay, other than by feeling the pulse, let's say that you know that you have got tachycardia, the patient's pulse is just racing, but you want to know what you can do medically to treat that patient, you want to know if they have got acidosis, if they have got a specific cardiac arhythmia or dysrhythmia, how do you find that out?

DR. GARDNER: You go to a hospital.

MR. AYRES: Go to a hospital. How much whole blood did they have at Reproductive Services, Inc., how much did they keep on hand there?

DR. GARDNER: None.

MR. AYRES: How much plasma?

DR. AYRES: None.

* * *

MR. AYRES: Okay, now if you have got somebody with a low hematocrit, of a lower than, what is the percentage now, thirty something, thirty-five, what does it get to the point that fluid replacement unaccompanied by oxygen bearing ability becomes material, what is the number?

DR. GARDNER: You worry if it is less than thirty.

MR. AYRES: All right, now if you have a patient with a hematocrit of less than thirty and they are in hypovolemic shock, the fluid of choice is Ringer's lactate but when they have hematocrit of less than thirty, that doesn't replace the blood's ability to bear oxygen, does it?

DR. GARDNER: No, sir.

MR. AYRES: So you have got to have whole blood, right?

DR. GARDNER: It carries more oxygen.

MR. AYRES: All right, sir, and if you don't have whole blood and you keep giving the Ringer's latate (sic) and they keep bleeding, what happens?

DR. GARDNER: You don't have any red cells.

MR. AYRES: So what happens?

DR. GARDNER: They die.

* * *

MR. AYRES: Now after you assessed the situation and found that Ms. Lott was critically ill and in need of emergency care and treatment, what did you do?

DR. GARDNER: Asked to call an ambulance and to call Mr. Watkins back.

* * *

MR. AYRES: What was the purpose of calling the ambulance?

DR. GARDNER: To take the patient to the hospital.

MR. AYRES: All right, what was the purpose of calling Dr. Watkins?

DR. GARDNER: To request permission to take her to St. Paul Hospital.

MR. AYRES: Why did you want to take her to St. Paul's Hospital?

DR. GARDNER: It was close.

MR. AYRES: That wasn't the only reason, was it?

DR. GARDNER: That was the major reason. The major reason was that it was close.

MR. AYRES: And the reason you had to call Dr. Watkins was because you didn't have privileges at St. Paul, isn't that right?

DR. GARDNER: Yeah, I don't have privileges.

* * *

MR. AYRES: And how far away was that from where you were?

DR. GARDNER: Possibly half a mile.

MR. AYRES: Half a mile. This lady is bleeding to death, she's in need of immediate care and attention, you assess the situation and call an ambulance and while the ambulance is coming, you call Dr. Watkins to get permission to take her to St. Paul, right?

DR. GARDNER: Yes.

MR. AYRES: What did Dr. Watkins say?

DR. GARDNER: I didn't talk to him, but he indicated that he would rather I took her to Methodist where I was on the staff.

MR. AYRES: You didn't talk to Dr. Watkins?

DR. GARDNER: No.

MR. AYRES: Well, how did you get the information that he didn't want her taken to St. Paul?

DR. GARDNER: Ms. Rucker talked to Dr. Watkins.

MR. AYRES: I see. So you had Ms. Rucker call the ambulance and call Dr. Watkins while you stayed with the patient?

DR. GARDNER: While I stayed with the patient and I ran an hematocrit, both of which we were doing at the time, we were checking the patient and running an hematocrit and making phone calls all at the same time or rechecking the hematocrit, I'm sorry.

MR. AYRES: So, the circumstances were that given this situation, Dr. Watkins who was in the staff there, I guess you could say the staff there at Reproductive Services, Inc., did not want the patient taken to St. Paul Hospital less than a half a mile away?

DR. GARDNER: I guess you can say that.

MR. AYRES: Rather he wanted you to take her to the hospital where you had staff privileges, Methodist Hospital, which was how many miles away?

DR. GARDNER: I can't tell you exactly how many miles away it is.

MR. AYRES: It's a long way, isn't it?

DR. GARDNER: Yes, sir, it's --

MR. AYRES: In point of fact, isn't it true, Doctor that in order to get to Methodist Hospital from Hines and Maple, the most direct route to take would take you right by St. Paul Hospital and right by the front door or the side door if you went down Medical Center Drive, by Parkland Hospital, you would drive right by both of them to go, the fastest route is Stemmons Freeway, isn't that true?

DR. GARDNER: You would drive by both of them.

* * *

MR. AYRES: Had anyone ever told you or implied to you that in the event of a complication at this clinic, you weren't to take these patients to Parkland Hospital?

DR. GARDNER: No one had ever told me I was not to take a patient to Parkland Hospital. It may have been implied or at least I had inferred that.

* * *

MR. AYRES: Can you tell me how much time elapsed from the time that you called the ambulance or requested that it be called until the ambulance in fact arrived?

DR. GARDNER: As near as I can recollect approximately forty minutes.

* * *

MR. AYRES: Okay, you are a physician dealing with a woman who is bleeding to death, in serious jeopardy of her life and you wait forty minutes for an ambulance to get there.

At some point in time you must begin to wonder where the ambulance is.

DR. GARDNER: That's right.

MR. AYRES: Knowing the facilities that we have in the City of Dallas for the care of emergency cases like this, you must have wondered where the ambulance was?

DR. GARDNER: Yes, sir.

MR. AYRES: Did you make inquiry about it?

DR. GARDNER: I think so. I believe I did.

MR. AYRES: And this would have been to Ms. Rucker?

DR. GARDNER: If I didn't make inquiry about it, I certainly wondered out loud where the ambulance was.

MR. AYRES: It is an inordinately long period of time for somebody critically ill to wait for transportation, isn't it?

DR. GARDNER: Yes, sir, and it was a long period of time for us to wait.

* * *

MR. AYRES: All right, now when you made inquiry of Ms. Rucker about where the ambulance was, were you told why it was taking the fire department so long to get there?

DR. GARDNER: I don't recall. I think that I was told that it was American Ambulance Service, and I don't remember whether there was a reason given for why it was taking so long.

MR. AYRES: Well, did it strike you peculiar that Ms. Rucker told you that American Ambulance Service had been called for this patient when you knew that Dallas Fire Department paramedics were available to you out of the station right down the street there at Cedar Springs, just right off the street down there, you

have been by it, I know, didn't it strike you peculiar that those paramedics on that ambulance weren't called?

DR. GARDNER: Yes, sir.

MR. AYRES: What did you do about it?

DR. GARDNER: I waited.

* * *

MR. AYRES: So essentially the circumstances as I understand them were you have already told me that you felt like Ms. Rucker had authority over you, the circumstances were you had a critically ill patient who Dr. Watkins didn't want taken to St. Paul Hospital, which was half a mile away and who Ms. Rucker didn't want the fire department to transport.

DR. GARDNER: I don't know if it was that she didn't want the fire department to transport them or if it was just the routine to call American Ambulance Service.

* * *

MR. AYRES: I don't understand something, Doctor, I see a woman here who is bleeding to death, whose hematocrit is twenty-two, who has falling blood pressure, who tilts, who gives every sign that she is going to die and yet there is no provision made to transport her by emergency means, tell me why, why?

DR. GARDNER: The only reason I can give you is that we may not have been familiar with the fact that American Ambulance Service does not respond as quickly as the fire department.

MR. AYRES: Would it be fair to say that you in this particular at least had absolutely no idea what emergency medical service facilities were available to treat people who were seriously ill?

DR. GARDNER: I had no idea what emergency facilities American Service had available.

* * *

MR. AYRES: When you had the case with Ms. Jackson, Louchrisser Jackson, the same clinic, same facilities, virtually the same circumstances in some respects, same complications, same emergency situation, again Reproductive Services, Inc. called American Ambulance Service to transport the patient, didn't they?

DR. GARDNER: Yes, sir.

* * *

MR. AYRES: Well, Dr. Gardner, if this lady came into your, came in this facility here and she was a married woman, she had a child and she wanted to have other children --

DR. GARDNER: Yes, sir.

MR. AYRES: --happily married, no problems, she wanted the child but she was deathly afraid that the child might be deformed --

DR. GARDNER: Yes, sir.

MR. AYRES: -- she is not a highly educated woman, she just has a rudimentary understanding of these things, and the reason that she felt that the child would be deformed was that she had pain medication and surgery and general anesthesia when she was pregnant and she didn't know she was pregnant, --

DR. GARDNER: Yes, sir.

MR. AYRES: -- you wouldn't have aborted that woman's baby now, would you, as a doctor, you would not, would you, if that was the reason for the abortion,

you wouldn't have done it, would you?

DR. GARDNER: If that was the only reason for the abortion, then I would need more information before I made a decision as to whether it should be or should not be.

MR. AYRES: So the answer to my question is if you had had that information, if you had known the true facts as to Claudia Lott's condition, you would not have aborted her in that room on that occasion, would you?

DR. GARDNER: No, sir, I would not.

* * *

BY MR. KELSOE:

MR. KELSOE: State your name for the Court, please.

MS. MCNEELY: Jerry McNeely.

* * *

MR. KELSOE: And in what capacity are you presently employed by Reproductive Services?

MS. MCNEELY: Clinic Director.

* * *

MR. KELSOE: All right, now if I recall your testimony correctly yesterday, you say that you do have two R.N.'s employed, but basically only one of them is normally on duty at a single time, is that correct?

MS. MCNEELY: Usually, yes, sir.

* * *

MR. KELSOE: All right, does this L.V.N. have a license as a Licensed Vocation Nurse?

MS. MCNEELY: Yes.

MR. KELSOE: All right, what is her name?

MS. MCNEELY: Romana Rodriguez.

MR. KELSOE: Romana Rodriguez. All right, now you have got the recovery room, and you call her a nurse but we have got that in quotes because you say she is not actually a nurse, is that correct?

MS. MCNEELY: She was trained in another country before she came to work with us. She went to SMU and asked them to evaluate her training from the country she was in and give her papers so that we could see the equivalency for her here.

MR. KELSOE: Let me ask you this, does SMU have a School of Nursing?

MS. MCNEELY: No.

MR. KELSOE: Ma'am?

MS. MCNEELY: No, they do not.

MR. KELSOE: They never have had, have they?

MS. MCNEELY: I don't know.

MR. KELSOE: Since you have been here, SMU doesn't have a School of Nursing.

MS. MCNEELY: Not that I know of.

MR. KELSOE: So this woman you say was trained in another country?

MS. MCNEELY: Yes.

MR. KELSOE: Where was that?

MS. MCNEELY: Belgium.

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MR. KELSOE: All right, and she doesn't have any license?

MS. MCNEELY: She does not have one from the State of Texas.

MR. KELSOE: And what is her name? Does she have a license from anybody?

MS. MCNEELY: No.

MR. KELSOE: Okay, what is her name?

MS. MCNEELY: Renee Pritchard.

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MR. KELSOE: All right, now the next one you called a medical assistant, but I believe you told us it is not really an assistant, that's just a title because they don't have any license anyway in the State of Texas, is that correct?

MS. MCNEELY: Her training is equivalent to an L.V.N. I'm not sure if she is licensed in the State of Texas. That question you could ask of her.

MR. KELSOE: Well, you told me yesterday she didn't have any license, didn't you?

MS. MCNEELY: I may have.

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MR. KELSOE: Now the next one you designated as an operating room technician but again you said that she doesn't have any license, is that correct?

MS. MCNEELY: That's correct.

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MR. KELSOE: Oh, I see. Well, now Mrs. McNeely,

your R.N. is doing, you have just got one of those on duty, she is doing your physicals, isn't she?

MS. MCNEELY: Not necessarily.

MR. KELSOE: Well, who is doing the physicals then?

MS. MCNEELY: The L.V.N. and the medical assistant both do the palpation, too.

MR. KELSOE: Oh, I see. So you are letting a Licensed Vocation Nurse that has no medical training -- tell us what a Licensed Vocation Nurse is supposed to do as you understand it, please, ma'am?

MS. MCNEELY: In our particular clinic?

MR. KELSOE: No ma'am. Under the statute of the State of Texas, what authority?

MS. MCNEELY: I am not aware of that.

MR. KELSOE: You don't know?

MS. MCNEELY: No, I do not know?

MR. KELSOE: You made no effort to find out?

MS. MCNEELY: No.

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MR. KELSOE: And the L.V.N. then is actually doing physicals and palpation with reference to the size of the fetus, is that correct?

MS. MCNEELY: She is doing palpations, yes.

MR. KELSOE: And she is making the determination as to the size of the fetus and as to how far along the lady is in her pregnancy?

MS. MCNEELY: Yes.

MR. KELSOE: Okay.

MS. MCNEELY: At that point.

MR. KELSOE: Okay, and the medical technician is also, medical assistant is also doing that?

MS. MCNEELY: Yes, sir, that's correct.

MR. KELSOE: And she doesn't have any type of license from the State of Texas, does she?

MS. MCNEELY: Not that I know of.

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MR. KELSOE: All right, now give us the names of the five counselors.

MS. MCNEELY: Judy McMill.

MR. KELSOE: Judy McMill.

MS. MCNEELY: Do you want her degree?

MR. KELSOE: Yes.

MS. MCNEELY: She has a Bachelor's in Sociology from SMU.

MR. KELSOE: All right.

MS. MCNEELY: Doreen Nash.

MR. KELSOE: Doreen Nash. What type of degree does she have?

MS. MCNEELY: A Bachelor's Degree in Health Education and I believe it was from the Univesity of Connecticut. I'm not sure.

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MR. KELSOE: Give me the name of the next

counselor, please, ma'am?

MS. MCNEELY: Pat Stahl, S-t-a-h-l. She has a Bachelor's in languages.

MR. KELSOE: A Bachelor's in languages?

MS. MCNEELY: From Cornell.

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MR. KELSOE: What is the name of the next counselor, please.

MS. MCNEELY: Patty Goodfriend.

MR. KELSOE: Patty Goodfriend?

MS. MCNEELY: Yes.

MR. KELSOE: What type of degree does Patty Goodfriend have, please, ma'am?

MS. MCNEELY: It's from the University of Texas I believe in Sociology. It could be psychology.

MR. KELSOE: All right, I believe we are short one, one more.

MS. MCNEELY: Hope Zararie.

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MR. KELSOE: What type of degree if any does she have, please, ma'am?

MS. MCNEELY: She has not completed her degree.

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MR. KELSOE: Okay, now you told us yesterday that you have two part time counselors. What are their names, please, ma'am?

MS. MCNEELY: One is Esther T-i-e-j-i-e-r-i-n-a, Tiejierina.

MR. KELSOE: What type of degree does she have, please, ma'am?

MS. MCNEELY: She does not have a degree.

MR. KELSOE: No degree. Okay, and what is the second part time counselor?

MS. MCNEELY: Nettie Cox.

MR. KELSOE: Who?

MS. MCNEELY: Nettie Cox. C-o-x.

MR. KELSOE: All right.

MS. MCNEELY: She has a Bachelor's but I do not remember what it is in.

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MR. KELSOE: Mrs. McNeely, what are the instructions that you have given with reference to what ambulance service to use in case of an emergency?

MS. MCNEELY: I have left no instructions.

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MR. KELSOE: What are the emergency instructions then with reference to calling an ambulance?

MS. MCNEELY: At this time?

MR. KELSOE: Yes, ma'am.

MS. MCNEELY: We have the new ambulance number posted in the clinic.

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MR. KELSOE: None. Okay, before April 1st, 1978, what was your policy with reference to calling ambulances?

MS. MCNEELY: We really did not have a policy.

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MR. KELSOE: And so are you telling this Court that you don't know what the policy was with reference to emergency ambulances from 1974 to April 1st, 1978, is that your sworn testimony to this Court?

MS. MCNEELY: Yes.

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